No. 91-2051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF SOUTH DAKOTA IN ITS OWN BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE AND DENNIS ROUSSEAU, PERSONALLY AND AS DIRECTOR OF CHEYENNE RIVER SIOUX TRIBE GAME, FISH AND PARKS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX--VOLUME ONE

SCOTT B. McELROY
Greene, Meyer & McElroy
1007 Pearl Street
Boulder, CO 80302
(303) 442-2021
Counsel of Record
for Respondents

MARK BARNETT
ATTORNEY GENERAL
State of South Dakota
500 East Capitol
Pierre, SD 57501
(605) 773-3215
Counsel of Record
for Petitioner

Petition for Certiorari Filed June 19, 1992
Certiorari Granted October 5, 1992

John P. Guhin
Deputy Attorney General
500 E. Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioner

Bruce R. Greene
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, Suite 240
Boulder, CO 80302
Telephone (303) 442-2021

Mark C. Van Norman
Steven C. Emery
Timothy W. Joranko
Cheyenne River Sioux Tribe
Office of the Attorney General
P.O. Box 590
Eagle Butte, SD 57625
Telephone (605) 964-6686

Counsel for Respondents

TABLE OF CONTENTS

Volume One

Docket Entries

CIV88-3049

State of South Dakota v. Wayne Ducheneaux

DATE	NR	PROCEEDINGS
1988		
Nov. 10	2	COMPLAINT filed.
Nov. 10	3	Plff'S APPLICATION for Temporary Restraining Order filed.
Nov. 10	6	Temporary RESTRAINING ORDER filed.
Nov. 18	9	ORDER Extending Temporary Restraining Order until 11/28/88 and Scheduling Hearing for 11/22/88 @ 10:00 AM in Pierre is [sic] parties do not resolve this dispute filed.
Nov. 22	12	AMENDED COMPLAINT filed.
Nov. 22		Enter HEARING on Oral Arguments for Preliminary Injunction before the Hon. Donald J. Porter, Chief Judge, presiding. Ruling Reserved.
Nov. 28		Enter HEARING on Preliminary Injunction before the Hon. Donald J. Porter, Chief Judge, presiding.
Nov. 29		Enter CONTINUATION OF HEARING on Preliminary Injunction before the Hon. Donald J. Porter, Chief

		Judge, presiding. Ruling Reserved.
Nov. 29	18	ORDER continuing Order of 11/18/88 until the earlier of 12/8/88 or a decision by this Court on the Preliminary Injunction Issue filed.
Dec. 2	19	ANSWER to Amended Complaint filed.
Dec. 6	22	MEMORNADUM [sic] OPINION filed.
Dec. 6	23	ORDER issuing preliminary injunction to enjoin Dfdt's from enforcing or causing to be enforced tribal hunting & fishing laws against state-licensed, non-Indian hunters or fishers on non-Indian fee lands and that no preliminary injunction shall issue w/regard to enforcement of tribal game laws upon state-licensed, non-Indians hunting or fishing on the "taking land" owned by the Corp of Engineers and that litigants shall conduct discovery and prepare in a speedy fashion so the merits can be tried in the near future filed.
Dec. 13	28	Pre-Trial ORDER Scheduling Court Trial for 7/12/89 @ 9:30 AM and setting deadline for amending pleadings for 1/6/89; deadline for filing motions for 4/1/89 and deadline for discovery for 4/1/89 filed.

1989		
Jan. 9	31	Plff's. MOTION to Amend Complaint filed. Copy fur. court.
Feb. 2	36	ORDER granting plff's. motion to file their Second Amended Complaint filed.
Feb. 6	37	SECOND AMENDED COMPLAINT filed.
Feb. 10	38	Dfdts' ANSWER to Second Amended Complaint filed.
Mar. 22	47	ORDER Extending Discovery Deadline till 6/1/89 filed.
Mar. 27	48	Tribal Dfdts' MOTION to Dismiss for Failure to Join Indispensable Parties filed. Copy fur. Court.
May 8	62	Plff's RESPONSE to Dfdts' Motion to Dismiss filed.
May 10	63	Tribal Dfdts'. MOTION to Reschedule Trial Date filed. Copy fur. to Court.
VOL.III		
May 22	68	JOINT MOTION for Continuance of Trial filed. Copy fur. Court.
July 3	81	MEMORANDUM OPINION filed.

VOL. IV

Oct. 17 132 Plff's. Designation of WITNESSES filed.

Oct. 17 133 Plff's. TRIAL BRIEF w/attachments (attachments in expandos)

VOL. V

Oct. 17 134 Dfdts' PRE-TRIAL MEMORANDUM and RESPONSE to the Court's Order of October, 1989 w/attachments (attachments in expando)

Oct. 18 137 Dfdts' REPLY MEMORANDUM in Support of their Motion in Limine filed.

Oct. 23 153 Dfdt's. MEMORANDUM in Response to the State's Pretrial Brief filed.

Oct. 24 157 REPLY BRIEF of State of South Dakota to Defendants' PreTrial Memorandum filed.

Oct. 24 Enter PRE-TRIAL CONFERENCE before the Hon. Donald J. Porter, Chief Judge, presiding.

Oct. 25 Enter COURT TRIAL PROCEEDINGS before the Hon. Donald J. Porter, Chief Judge, presiding.

Oct. 26 Enter COURT TRIAL PROCEEDINGS before the Hon. Donald J. Porter, Chief Judge, presiding.

Oct. 27 Enter COURT TRIAL PROCEEDINGS

before the Hon. Donald J. Porter, Chief Judge, presiding.

Oct. 30 Enter COURT TRIAL PROCEEDINGS before the Hon. Donald J. Porter, Chief Judge, presiding.

Oct. 31 Enter COURT TRIAL PROCEEDINGS before the Hon. Donald J. Porter, Chief Judge, presiding.

Nov. 1 161 EXHIBIT LIST filed.

Nov. 1 Enter COURT TRIAL PROCEEDINGS before the Hon. Donald J. Porter, Chief Judge, presiding. Ruling Reserved.

Nov. 16 162 Plff's APPLICATION for Temporary Restraining Order filed.

Nov. 16 163 Plff's BRIEF in Support of Application for Temporary Restraining Order filed.

Nov. 17 165 Dfdt's RESPONSE to State's Application for Temporary Restraining Order filed

Nov. 17 166 ORDER that dfdts. shall be enjoined from enforcing tribal hunting regulations on non-Indians on the Corps taking area during the remainder of the deer season filed.

Nov. 22 167 Dfdts' MOTION to Dissolve Temporary Restraining Order filed. Copy fur. court.

Nov. 28 173 ORDER Dismissing Dfdt's Motion

		to Dissolve the Temporary Restraining Order as Moot filed.
1990		
Jan. 5	179	ORDER that the parties shall simultaneously submit proposed findings by 2/5/90, at 5:00 p.m. C.S.T. and further Ordered that the parties shall have twenty days thereafter in which to file a reply to opposing counsel's proposed findings filed.
Jan. 30	181	Amended ORDER that Plff. file brief and proposed findings on or before 5:00 PM on 2/5/90 and Dfdt. file answering brief and proposed findings on or before 5:00 PM on 2/26/90 and that simultaneous reply briefs be filed on or before 3/13/90 filed [sic].
Feb. 1	183	AMENDED ORDER scheduling Simulateous [sic] Briefs for 2/26/90 by 5:00 PM and simultaneous reply briefs for 3/13/90 by 5:00 PM filed.
Feb. 26	184	Tribal Dfdts'. FINDINGS of Facts filed unattached in expando.
Feb. 26	185	Tribal Dfdts'. Post Trial MEMORANDUM filed unattached in expando.
Feb. 26	187	FINDINGS of Fact Proposed by Plff. filed.
Feb. 26	188	BRIEF in Support of Entry of

		Findings of Fact Proposed by Plff. filed.
Feb. 28	189	Plff's MOTION for Extension of Time for Filing Reply Briefs filed. Copy fur. Court.
Mar. 2	190	ORDER granting plff's. Motion for Extension of Time for filing reply briefs to 3/26/90 filed.
Mar. 6	191	Govt's MOTION to File Amicus Curiae Memorandum filed. Copy fur. Court.
Mar. 7	192	ORDER Granting Govt's Motion to File Amicus Curiae Memorandum filed.
Mar. 7	193	Govt's Amicus Curiae MEMORANDUM filed.
VOL. 7		
Mar. 26	194	Tribal Dfdts.' Post Trial REPLY Memorandum filed.
Mar. 26	196	State's RESPONSE to Tribal Dfdts' Proposed Findings of Fact filed. (in expando)
Mar. 26	197	State's Post-Trial REPLY Brief filed.
Aug. 21	198	MEMORANDUM OPINION filed.
Aug. 22	199	ORDERED that the Judgment of the Court is rendered as set out in the Memorandum Opinion filed.
Sept.19	200	NOTICE of APPEAL filed.

Oct.	2	202	NOTICE OF APPEAL filed.
1992			
Apr.	28	204	C. copy of ORDER from U.S. Court of Appeals denying Appellee's motion for stay of the mandate.
May	6	205	OPINION from U.S. Court of Appeals affirming in part and reversing in part Judgment of this Court.
May	6	206	MANDATE from U.S. Court of Appeals affirming in part and reversing in part Judgment of this Court.
7/6/92		208	NOTICE of filing petition for certiorari (cm) [Entry date 7/9/92] [Edit date 7/9/92]

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

December 5, 1988

John P. Guhin
Deputy Attorney General
State Capitol
Pierre, South Dakota 57501-5070
Attorney for Plaintiff

Scott McElroy
GREEN, MEYER, & McELROY
1007 Pearl Street, Suite 20
Boulder, Colorado 80302

Krista Clark
DAKOTA PLAINS LEGAL SERVICES
Box 727
Mission, South Dakota 57555
Attorneys for Defendants

RE: CIVIL NO. 88-3049
STATE OF SOUTH DAKOTA, Plaintiff,
vs.
WAYNE DUCHENEAUX, personally and as Chairman of the Cheyenne River Sioux Tribe, and LENITA MINER, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks, Defendants.

Dear Counsel:

MEMORANDUM OPINION

On November 10, 1988, the state filed a complaint in the above captioned case to seek injunctive and declaratory relief against defendants Ducheneaux and Miner, two officials of the Cheyenne River Sioux Tribe, to prevent the defendants from enforcing tribal hunting laws upon state-licensed non-Indians hunting deer on non-Indian and Army Corps of Engineers land within the Cheyenne River Indian Reservation. Fearful of confrontation between armed non-Indian deer hunters and tribal game wardens, this Court on November 10 issued a temporary restraining order, which subsequently was extended until and including November 28, 1988. The deer season for those hunting with rifles in western South Dakota expired on November 27, 1988.

On November 22, 1988, this Court heard oral arguments on whether to dissolve the

temporary restraining order or to issue a preliminary injunction. The state on that same day filed an amended complaint extending the complaint and prayer to include all hunting and fishing, instead of just deer hunting. Understandably, defendants were unprepared at the November 22 hearing to present facts regarding fishing and hunting animals other than deer. This Court therefore decided against modifying the temporary restraining order or issuing other injunctive relief, and instead held evidentiary hearings on November 28 and 29, 1988, to evaluate several difficult factual questions relating to injunctive relief.

The defendants assert that they have authority to regulate all hunting and fishing on both fee land and on the "taking area." The taking area is a gerrymandered strip of land adjacent to the Missouri River and Lake Oahe on the eastern end of the Cheyenne River

Indian Reservation. The Army Corps of Engineers owns the land, which was taken from private owners in 1954 for development of the Missouri River and Lake Oahe. Much of the taking area is fenced as parts of range units maintained by Indian ranchers who have grazing rights on the taking area. It is nearly impossible without a map to know the boundaries of the taking area since the land is not generally fenced or otherwise demarcated from trust or fee land. In many cases, hunters[1] pass through Indian land to access the taking area.

At the November 28 hearing, defendants agreed to refrain from enforcing tribal hunting laws on fee lands held by non-Indians.

---

[1]This memorandum opinion concentrates on hunting since the bulk of the testimony in this case has focused on hunting. Everything said in this opinion regarding hunting and hunters is meant to include fishing and fishermen.

The defendants do not concede that they lack authority over these lands, but merely have chosen not to object at this time to the entry of a preliminary injunction regarding non-Indian fee lands. Defendants have further agreed to provide two weeks notice if they desire to change their position. Therefore, the only issue presently before this Court is whether to grant a preliminary injunction to prevent the defendants from enforcing tribal game laws on the taking area.

II. DISCUSSION

A. Standard for Issuing a Preliminary Injunction

Rule 65 of the Federal Rules of Civil Procedure authorizes this Court to issue a preliminary injunction. To determine whether to grant a preliminary injunction, this Court must consider four factors: 1) threat of irreparable harm to the movant; 2) balance between this harm and the injury that granting

the injunction will inflict on other litigants; 3) probability that movant will succeed on the merits; and 4) public interest. Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981)

A movant must show a threat of irreparable harm or the motion for a preliminary injunction will be denied. Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987); Harris v. United States, 745 F.2d 535, 536 (8th Cir. 1984); Roberts v. Van Buren Public Schools, 731 F.2d 523 , 526 (8th Cir. 1984). Because the state has failed to make a sufficient showing of irreparable injury, this Court refuses to issue a preliminary injunction with regard to the taking area.

B. Threat of Irreparable Harm to the State

The state contends that absent injunctive relief, it is threatened by three types of

irreparable injury: 1) confrontation involving state-licensed hunters and tribal game wardens; 2) decreased value and marketability of the state licenses; and 3) disruption of the state's wildlife management program.

1. Confrontation

Any enforcement of hunting laws involves a certain amount of "confrontation". This Court, however, must decide whether the confrontation resulting from attempts by tribal officials to enforce tribal game laws on state-licensed non-Indian hunters poses a threat of irreparable injury sufficient to merit injunctive relief. There are two ways in which confrontation may pose a threat of irreparable injury: 1) resistance by state-licensed non-Indian hunters to the authority of the tribal wardens possibly resulting in armed hostilities; and 2) tribal overreaching in law enforcement.

Hostile Resistance

Ron Catlin, the law enforcement staff specialist for the state's Game, Fish and Parks Department, and Don McCrea, the state's wildlife conservation officer for Ziebach County, both testified that physical confrontations between state game wardens and violators of game laws are quite rare. N. Dennis Rousseau, a game warden for the Cheyenne River Sioux Tribe's Game, Fish and Parks Department, similarly reported that he had never experienced serious resistance to his enforcement of tribal laws. Though the state game officials appear to be much better trained and educated in game management, the tribal wardens receive instruction on how to approach hunters and enforce the law. Tribal game wardens have confronted non-Indian hunters presumed to be in violation of tribal hunting law on three occasions. Each situation was resolved peaceably.

Historically, tribal game wardens have sought to avoid confrontation although by allowing non-Indians improperly hunting without a tribal license to buy the $8 sticker rather than aggressively pursuing civil charges or confiscating property. Therefore, the evidence suggests that tribal wardens will not encounter hostile resistance to tribal authority from a state-licensed hunter on the taking land.

In addition, enforcement of tribal hunting laws on the taking area does not pose as much a threat of "confrontation" as would tribal enforcement on non-Indian lands. The taking land has a distinct Indian flavor since it is owned by the federal government and largely controlled by Indians through grazing agreements. In contrast, a state-licensed hunter on non-Indian fee land would be more likely to resist tribal authority since the land is generally not under Indian control and

may indeed be owned by the hunter or the hunter's non-Indian friend.

Tribal Overreaching

A possible second threat of confrontation is tribal overreaching of its enforcement authority. Conceivably, the state would be irreparably injured if the defendants were to enforce tribal laws in such a manner as to exceed the limited tribal authority over non-Indians or deny non-Indians constitutional rights. See Greywater v. Joshua, 846 F.2d 486, 492 (8th Cir. 1988) (limited tribal authority over non-Indians); National Ass'n of Psychiatric Treatment Centers v. Weinberger, 661 F.Supp. 76, 81 (D.Colo. 1986) (impact of challenged actions on other interested parties besides the litigants is relevant to evaluating injury); Walker v. Wegner, 477 F.Supp. 648, 653 (D.S.D. 1979), aff'd, 624 F.2d 60 (abridgement of first amendment freedoms is an irreparable injury).

Historically, tribal enforcement of its hunting laws against non-Indians has been far from aggressive unreasonableness. In two instances, the tribe has sought to enforce its hunting laws arguably beyond its authority.[2] In both instances, tribal officials cooperatively rectified the situations. The tribe has not criminally prosecuted or imposed

---

[2]In 1987, tribal game warden N. Dennis Rousseau stopped a non-Indian named Michael Keys on the taking area for improperly-hunting deer. After checking with state and federal officials, Rousseau was told that the tribe lacked jurisdiction, so no action was pursued against Keys.

In another instance, several deer hunters were stopped by a tribal game warden for hunting deer on non-Indian fee land without a tribal license. The hunters simply purchased licenses from the tribe at that time. After the tribe learned that under present law no tribal license was required of non-Indians hunting on non-Indian lands, the tribe allowed the hunters to return to the reservation after deer season had ended and to hunt deer on Indian lands. Whether the tribe indeed lacked authority in these two instances is the question that this Court must resolve when the case is submitted on the merits. What is noteworthy now is that the tribe did not act unreasonably and was quick to correct perceived mistakes.

severe or unfair penalties on non-Indian hunters.

The state emphasized throughout the hearings that the tribe's original announcement before the deer hunting season about enforcement of tribal game laws mentioned that the tribe would prosecute all violators of its game laws. The state also stressed that defendant Ducheneaux has reaffirmed that the tribe would enforce its hunting laws against non-Indians if allowed to do so. Given the history of tribal enforcement, this court believes that defendants and the tribe's three game wardens will not pursue aggressive, overreaching enforcement of tribal game codes against non-Indians on the taking area. If the defendants' enforcement of hunting laws on the taking area trammels non-Indian rights, this court would entertain a motion to modify the preliminary injunction. Presently, the threat

of confrontation is far too speculative to qualify as a threat or irreparable injury. See Salant Acquisition Corp. v. Manhattan Industries, Inc., 682 F.Supp. 199, 202 (S.D.N.Y. 1988) (threat of irreparable injury must be actual or imminent, not remote or speculative).

2. Effect on License Value and Marketability

The state argues that if the tribe has the ability to regulate and perhaps severely restrict non-Indian hunting, the value and sales of the state licenses will drop as non-Indian hunters will become increasingly reluctant to hunt on the reservation. Courts usually are reluctant to grant a preliminary injunction when the alleged injury is merely pecuniary in nature. See, e.g., Regents of University of California v. American Broadcasting Companies, Inc., 747 F.2d 511, 519 (9th Cir. 1984); Perpetual Bldg. Ltd.

Partnership v. District of Columbia, 618 F.Supp. 603, 615 (D.D.C. 1985). Monetary loss frequently is not a irreparable injury since money damages caused by another's unlawful activities usually are recoverable and thus remediable. Morton v. Beyer, 822 F.2d 364, 372 (3d Cir. 1987); Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1349 (7th Cir. 1982). The entry of a preliminary injunction regarding fee land safeguards the value of the state license with respect to non-Indian hunting on private non-Indian land. The refusal to extend the preliminary injunction to the taking area will not appreciably affect the value and sales of state licenses for several reasons. First, the taking area is a relatively small part of the reservation; few people apparently buy state licenses to hunt exclusively on the taking area. Second, there is no indication that the tribe will enforce its law on the

taking area to discourage non-Indians from hunting there altogether. Moreover, if this Court ultimately determines that the tribal defendants lack authority over the taking area, the state may be able to recover damages to the value of state licenses incurred as a result of tribal enforcement of its hunting laws in the taking area. See Danden Petroleum, Inc. v Northern Natural Gas Co., 615 F.Supp. 1093, 1099 (N. Tex. 1985) (injury is irreparable only if it cannot be undone through monetary relief). Therefore, shared regulation of hunting on the taking land during the pendency of this case does not pose a threat or irreparable injury to the value and marketability of state licenses.

3. Game Management

The State engages in detailed game management throughout the Cheyenne River Indian Reservation by stocking fish, safeguarding habitats and monitoring wildlife.

The tribe meanwhile does very little game management. The state contends that failure to preliminarily enjoin the tribal officers from enforcing their game laws would disrupt state management of game in Dewey and Zeibach counties.

The state's argument has merit in that tribal control of hunting throughout the reservation could frustrate the state programs for carefully controlled and preserved game population and habitat. However, according to the testimony of Wesley Rice, the senior biologist of the state Game, Fish & Parks Department, the state is able to effectively manage wildlife on the reservation despite exclusively controlling hunting on only half of the land.[3] Since the state can effectively

---

[3]The preliminary injunction preserves the state's exclusive control of hunting by non-Indians on non-Indian lands. Approximately half of the reservation land is non-Indian fee land.

manage game without 100% exclusive control of reservation hunting, allowing shared regulation of the relatively small strip of land called the taking area will not irreparably injure state game management. Moreover, the tribe does not seek to disrupt state game management policies. Indeed, notwithstanding this litigation, the state conservation officers and tribal game wardens appear to enjoy an amicable relationship.

C. Conclusion

The state has not met its burden of showing a threat of irreparable injury if the defendants are allowed to enforce their hunting laws on the taking area. The conclusion is based on a review of the situation as it presently exists. If tribal hunting laws are enforced in a manner detrimental to the state, this court may reconsider this decision. This ruling on the preliminary injunction does not imply a view

on the merits or on whether the tribe could successfully challenge a preliminary injunction concerning non-Indian fee land. This ruling similarly is not meant to discourage state enforcement of state hunting laws on the taking land.

BY THE COURT:

DONALD J. PORTER
CHIEF JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

STATE OF SOUTH DAKOTA, in its own behalf, and as parens patriae,	)	Civ. 88-3049
Plaintiff,	)	SECOND AMENDED COMPLAINT
v.	)	
WAYNE DUCHENEAUX, personally and as Chairman of the Cheyenne River Sioux Tribe and LENITA MINER, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks	)	
Defendants.	)	

COMES NOW the State of South Dakota in this action brought by and through its Attorney General and states:

I

This is an action by the State of South Dakota on its own behalf and on behalf of its citizens parens patriae against Wayne Ducheneaux and Lenita Miner seeking to

restrain and prohibit them from attempting to exclude non-Indians from hunting and fishing on non-Indian lands and waters purportedly within the Cheyenne River Sioux Reservation and from subjecting non-Indians to the criminal jurisdiction of the Cheyenne River Sioux Tribe and seeking declaratory relief. This action concerns hunting and fishing of all species, not merely deer, although the imminence of the deer seasons coupled with the Defendants' abrupt and illegal actions just before the opening of that season, precipitated the filing of the action.

II

Jurisdiction in this Court is invoked pursuant to the provisions of 28 U.S.C. § 1331, 1343(4), and 1337.

III

This case arises under various federal laws and statutes, including, but not limited to, the General Allotment Act, 25 U.S.C.

§ 331, et seq.; 18 U.S.C. § 1165; the Flood Control Act of 1944, § 4, codified at 16 U.S.C. 460d, and 36 CFR 327.26(b) and (c).

IV

This action is brought pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Preliminary and permanent injunctive relief is authorized by Rule 65 of the Rules of Civil Procedure.

V

Venue is properly in this Court in accordance with 28 U.S.C., § 1391(e) because the case of action arose and Plaintiff resides in the Central Division.

VI

The State of South Dakota is one of the states of the Federal Union and brings this action both on its own behalf and on behalf of its citizens parens patriae.

VII

Defendant Wayne Ducheneaux is Chairman of the Cheyenne River Sioux Tribe. Defendant Lenita Miner is the Director of the Cheyenne River Sioux Tribe's Game, Fish and Parks Program, or its equivalent

FACTS

I

The State of South Dakota has conscientiously and in good faith sought to make an agreement regarding hunting with the Cheyenne River Sioux Tribe. It commenced its negotiations regarding the current season two to three months prior to the filing of the original pleadings in this case, by submitting a proposed agreement to the tribe. After discussions with the tribe, a second proposed agreement was submitted in which the State of South Dakota made further concessions to the tribe.

During the negotiations, the State agreed to reduce the number of licenses from its 700

proposal. The conservation officer for Ziebach County believed 1000 licenses should have been issued. Approximately 359 licenses were actually sold by the State in Dewey and Ziebach Counties.

II

On November 8, and 9, 1988, the tribe made additional demands of the State. The tribe demanded that the State require that non-Indians have the permission of the tribe to hunt on lands taken by the Corps of Engineers for the Missouri River Reservoirs before hunting on such lands. The State of South Dakota declined to agree with such a demand.

III

Defendants thereupon notified the State of South Dakota, and also notified the radio stations, that the tribe would demand a tribal license for any person, Indian or non-Indian, who wished to hunt on all lands within the

reservation. Defendants demanded that non-Indians hunting on non-Indian land have a tribal license. Defendants demanded that non-Indians hunting on Corps of Engineers land have a tribal license.

IV

Defendants further announced that they would cause to be arrested and prosecuted non-Indians who hunted on fee lands or on public lands within the lands and waters considered by them to be part of the reservation in tribal court.

V

The tribe has never in the past systematically prohibited non-Indians from hunting on fee or public lands or waters on the areas referred to in paragraph IV.

VI

About half the land and water in Ziebach and Dewey Counties is non-Indian and is directly impacted by the Defendants' action.

VII

The State of South Dakota has sold approximately 359 deer hunting licenses for Dewey and Ziebach Counties within the boundaries of the Cheyenne River Sioux Reservation. While these licenses may not be used on tribally-owned or trust lands within the reservation without a license from the tribe, should it so demand, the licenses remain valid for fee land and public land on the reservation without a tribal license.

VIII

The deer hunting season opened November 12, 1988 and continued to November 27. In addition, a number of seasons other than deer are affected by the position taken by Defendants. Some of those seasons that are affected are as follows:

a. archery deer--Oct. 1 thru Dec. 31.
b. grouse--Sept. 17 thru Dec. 4.
c. partridge--Sept. 17 thru Dec. 4.
d. pheasant--Sept. 17 thru Dec. 4.
e. Canada geese--Oct. 8 thru Dec. 25.

f. light geese--Oct. 8 thru Jan. 1.
g. ducks--Dec. 10 thru Dec. 21.
h. mink, weasel--Oct. 29 thru Jan. 15.
i. muskrat & beaver--year around.
j. coyote, fox, raccoon, jackrabbit, badger--year around.
k. fishing--all species--year around seasons both in Missouri River and lakes of Dewey and Ziebach Counties (except spearfishing and paddlefishing).

IX

Defendants have threatened to arrest and criminally prosecute non-Indians who attempt to engage in hunting and fishing on lands and waters purportedly within the reservation without a tribal license. The Cheyenne River Sioux Tribe game wardens are armed with weapons.

X

The value of licenses issued by the State of South Dakota to non-Indians for hunting and fishing in Dewey and Ziebach Counties is seriously impaired by the Defendants' threats and wrongful assertions of authority.

XI

The State of South Dakota has an obligation and duty to protect its citizens, Indians and non-Indians, against unlawful exertions of authority by the Defendants, and in particular, to protect them against the threat of criminal prosecution in tribal court and to protect them in their right to hunt and fish on fee and public lands and waters actually or purportedly within the reservation.

XII

The Constitution of the Cheyenne River Sioux Tribe at Art. 4, § 1(k) provides that the tribe shall have authority to try and punish only "members of the tribe."

XIII

Exhaustion of tribal remedies is not mandated in this case because the actions of the Defendants are patently violative of the express jurisdictional prohibitions set forth by decree of the United States Supreme Court

and of the tribal constitution; moreover, exhaustion is not required because the acts of the Defendants are plainly motivated by a desire to harass as is evidenced by the timing and manner of the Defendants' action; finally, exhaustion is not required because the Defendants' actions are taken in bad faith.

XIV

Neither Defendant may invoke sovereign immunity in this case because their joint and separate actions are beyond authority allowed them under the constitution and laws of the United States and the constitution and by-laws of the tribe.

XV

Public Law 870-81 (1950) and Public Law 776-83 (1954) had the effect of diminishing the Cheyenne River Sioux Reservation as to areas taken by the United States at least at the time the tribe approved Public Law 776-83 (1954) by a 75 percent vote.

FIRST CLAIM FOR RELIEF

By embarking on the policy of arresting and prosecuting non-Indians in tribal court, the Defendants are acting contrary to the clear mandate of the United States Supreme Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) and of their own constitution. The Defendants have no jurisdiction to arrest or try any non-Indian for any reason.

SECOND CLAIM FOR RELIEF

A non-Indian holding a state license for lands and waters within Dewey and Ziebach Counties may hunt without interference by the Defendants on non-Indian owned lands and waters, including fee and public lands and overlying waters, including those of the Missouri River within the actual or purported boundaries of the reservation pursuant to the General Allotment Act, 25 U.S.C., § 331; Montana v. United States, 450 U.S. 544 (1981);

Flood Control Act of 1944, § 4 codified at 16 U.S.C. § 460d and 36 CFR 327.26. The present attempt of the Defendants to interfere with these rights is without basis.

THIRD CLAIM FOR RELIEF

In the alternative to the two claims of relief set forth above, the Defendants have no claim of jurisdiction over non-Indians for any purpose in areas taken by the United States for the construction of the Oahe reservoirs including the bed and overlying waters of the Missouri River, because such areas are no longer part of the Cheyenne River Sioux Reservation by virtue of Public Law 870-81 (1950), and Public Law 776-83 (1954) and, if necessary, the agreement of 75 percent of the voting members of the Tribe to the latter act.

PRAYER FOR RELIEF

WHEREFORE, the State of South Dakota respectfully requests this Court as follows:

A. To assume immediate jurisdiction over this matter.

B. Issue a declaratory judgment determining:

(1) Defendants have no jurisdiction to arrest and try non-Indians within the boundaries of the Cheyenne River Sioux Tribe for any offense; and

(2) Defendants have no jurisdiction to exclude non-Indians from hunting on fee lands or public lands and waters within or purportedly within the Cheyenne River Sioux Reservation, including the land and water areas taken by the United States for the building of the Oahe Reservoir.

(3) In the alternative to paragraphs (1) and (2) above, that the reservation has been diminished by the federal acts taking lands and overlying waters for the reservoir and, if found to be necessary, by

the tribal members' consent to the federal actions.

C. Issue temporary, preliminary and permanent injunctions prohibiting the Defendants from attempting to take the actions described above.

D. Award Plaintiff its costs and disbursements, herein, including a award of attorney's fees.

E. Award Plaintiff its other and additional alternative relief as may appear just and proper.

Dated this 6th day of January, 1989.

Respectfully submitted,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
/s/ John P. Guhin
Deputy Attorney General
State Capitol
Pierre, S.D. 57501-5070
Telephone: (605) 773-3215

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

STATE OF SOUTH DAKOTA in its own behalf, and as parens patriae, Plaintiff,	)	CIV. 88-3049
v.	)	ANSWER TO SECOND AMENDED COMPLAINT
WAYNE DUCHENEAUX, personally and as Chairman of the Cheyenne River Sioux Tribe and LENETA MINER, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks, Defendants.	)	

The Defendants, Wayne Ducheneaux and LeNeta Miner, in both their official and individual capacities, for their Answer to the Second Amended Complaint of the Plaintiff, state as follows:

1. The Defendants assert that the Complaint fails to state a cause of action or claim for relief against the Defendants for

which relief may be granted and, accordingly, the Complaint should be dismissed.

2. The Defendants assert that the Plaintiff has failed to join the Cheyenne River Sioux Tribe in this case and that under Rule 19 the case should be dismissed for failure to join an indispensable party.

3. The Defendants deny each and every allegation of the Complaint except as specifically admitted.

4. The Defendants assert that the first sentence of Paragraph I requires no answer. With respect to the remainder of that paragraph, the Defendants deny that they have engaged in abrupt and illegal actions and further state that they are without knowledge of the reasons for the State's filing of this action.

5. The Defendants deny that this Court has jurisdiction as alleged in Paragraph II.

6. The Defendants deny that there is a cause of action as alleged in Paragraph III.

7. With respect to paragraph IV, the Defendants deny that there is a cause of action in this case and deny that grounds exist for the issuance of an injunction pursuant to Rule 65.

8. The Defendants deny that there is a cause of action as alleged in Paragraph V but do not dispute that if a cause of actions exists, venue would lie in the Central Division.

9. The Defendants admit that the State of South Dakota is one of the states of the federal union but deny that it is entitled to bring this action on behalf of its citizens, parens patriae.

10. The Defendants admit the statements contained in Paragraph VII.

11. The Defendants deny the allegations in the first, second and third sentences of

Paragraph I (facts). The Defendants state that they are without knowledge to admit or deny the fourth and fifth sentences of that Paragraph.

12. The Defendants deny the allegations in the first, second and third sentences of Paragraph II (facts).

13. The Defendants admit the statements in Paragraph III (facts).

14. The Defendants deny the allegations in Paragraph IV (facts).

15. The Defendants deny the allegations in Paragraph V (facts).

16. The Defendants are without sufficient knowledge to admit or deny the allegations in Paragraph VI (facts).

17. The Defendants are without sufficient knowledge to admit or deny the allegations in the first sentence of Paragraph VII (facts). The Defendants deny the allegation in the second sentence of that Paragraph.

18. The Defendants admit the statement in the first sentence of Paragraph VIII (facts). The Defendants are without sufficient knowledge to admit or deny the allegations in the second sentence of that Paragraph. The Defendants deny the allegations in the remainder of that Paragraph.

19. The Defendants deny the allegations in the first sentence of Paragraph IX (facts). The Defendants admit the statements in the second sentence in that Paragraph.

20. The Defendants deny the allegations in Paragraph X (facts).

21. The Defendants deny the allegations in Paragraph XI (facts).

22. The Defendants deny the allegations in Paragraph XII (facts).

23. The Defendants deny the allegations in Paragraph XIII (facts).

24. The Defendants deny the allegations contained in Paragraph XIV (facts).

25. The Defendants deny the allegations and conclusions of law found in Paragraph XV (facts).

26. The Defendants deny that the Complaint sets forth any valid claim for relief.

Affirmative Defenses

27. The Complaint fails to state a cause of action upon which relief can be granted.

28. The State is without standing to commence an action as parens patriae against the Defendants.

29. The Plaintiff's allegations put into controversy the extent of the jurisdiction of the Cheyenne River Sioux Tribe on the lands of its reservation and consequently the Cheyenne River Sioux Tribe is an indispensable party. Because the Tribe is an indispensable party and has not been joined in this controversy this action should be dismissed pursuant to Rule 19(b), Federal Rules of Civil Procedure.

30. The Plaintiff's allegations put into controversy the interests of the United States as trustee for the Cheyenne River Sioux Tribe on the lands within the Reservation of the Cheyenne River Sioux Tribe. Because the United States is an indispensable party and has not been joined in this controversy, this action should be dismissed pursuant to Rule 19(b), Federal Rules of Civil Procedure.

31. The Defendants are officials of the Cheyenne River Sioux Tribe and are immune to suit when acting in their official capacity. Therefore this case should be dismissed.

32. The Defendants have taken no actions in their individual capacities and none of the allegations in the Complaint allege any individual actions by the Defendants. Accordingly, the action must be dismissed against them in their individual capacities.

33. Pursuant to its Constitution and By-Laws the Cheyenne River Sioux Tribe has juris-

diction to regulate hunting and fishing throughout its Reservation, including fee and public lands on the Reservation. The Tribal Constitution and By-Laws are consistent with principles of federal common and statutory law.

WHEREFORE, the Defendants plead that this Court:

1. Dismiss this cause of action with prejudice;

2. Award the Defendants its costs and disbursements in this action including reasonable attorneys' fees and such other and further relief as is just and equitable.

Dated: Feb. 8, 1989

Respectfully submitted,

GREENE, MEYER & MCELROY, P.C.
By: /s/ Scott B. McElroy
Scott B. McElroy
1007 Pearl St., Suite 210
Boulder, Colorado 80302
(303) 442-2021
Krista Clark
P.O. Box 1037
Mission, SD 47444
(605) 856-2464

(Certificate of Mailing omitted in printing)

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

DONALD J. PORTER
CHIEF JUDGE
413 U.S. COURTHOUSE
PIERRE, SOUTH DAKOTA 57501

August 21, 1990

John P. Guhin
Deputy Attorney General
State Capitol
Pierre, South Dakota 57501-5090

Mark Smith
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501-5090
Attorneys for Plaintiff

Scott McElroy
GREEN, MEYER, & McELROY
1007 Pearl Street, Suite 20
Boulder, Colorado 80301

Krista Clark
DAKOTA PLAINS LEGAL CLINIC
Box 727
Mission, South Dakota 57555

Steven C. Emery
Cheyenne River Sioux Tribe
Assistant Tribal Attorney
P.O. Box 590
Eagle Butte, South Dakota 57625
Attorneys for Defendants

RE: CIVIL NO. 88-3049
STATE OF SOUTH DAKOTA, Plaintiff,
vs.
WAYNE DUCHENEAUX, personally and as Chairman of the Cheyenne River Sioux Tribe, and LENITA MINER, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks, Defendants.

Dear Counsel:

MEMORANDUM OPINION

This action for declaratory and injunctive relief was brought by the State of South Dakota against tribal defendants Wayne Ducheneaux, chairman of the Cheyenne River Sioux Tribal Council, and Lenita Miner, director of the Cheyenne River Sioux Tribe Game, Fish and Parks. The controversy involves the extent of tribal hunting and fishing jurisdiction over nonmembers[1] on lands

---

[1]Following the United States Supreme Court's recent opinion in Duro v. Reina, ___ U.S. ___, 110 S. Ct. 2053, 109 L.Ed.2d 693 (1990), a decision on the limits of tribal civil jurisdiction over non-Indians on certain reservation lands should also decide the limits of tribal civil jurisdiction over nonmembers Indians on those same lands.

(continued...)

within the exterior boundaries of the Cheyenne River Reservation no longer owned by the Cheyenne River Sioux Tribe (Tribe) or any of

---

[1](...continued)
Justice Kennedy, writing for the majority, aptly summed up the Court's holding:

> The question we must answer is whether the sovereignty retained by the tribes in their dependent status within our scheme of government includes the power of criminal jurisdiction over nonmembers.
>
> We think the rationale of our decisions in Oliphant [v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed. 2d 209 (1978)] and [(United States v.] Wheeler, [435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed. 2d 303 (1978)] as well as subsequent cases, compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members.

Duro, 110 S.Ct. at 2059.

Even though the state's complaint seeks a determination of tribal jurisdiction over "non-Indians" without reference to nonmember Indians, Duro effectively eliminates any distinction. Accordingly, throughout this opinion the Court refers to both nonmember Indians and non-Indians as "nonmembers." See Lower Brule Sioux Tribe v. South Dakota, 540 F.Supp. 276, 288 n.14 (D.S.D. 1982), rev'd on other grounds, 711 F.2d 809 (8th Cir. 1983).

its members. These lands either are (1) held in fee by nonmembers or (2) were taken by the United States to construct the Oahe dam and reservoir. As this case concerns tribal rights and powers granted by various treaties and federal statutes, the Court has jurisdiction in this case pursuant to 28 U.S.C. §§ 1331.

After the State and the tribal defendants were unable to reach an agreement for the 1988 deer season for Dewey and Ziebach counties, South Dakota on its own behalf and on behalf of its citizens parens patriae sought the following relief:

> WHEREFORE, the State of South Dakota respectfully requests this Court as follows:
>
> A. To assume immediate jurisdiction over this matter.
>
> B. Issue a declaratory judgment determining:
>
> (1) Defendants have no jurisdiction to arrest and try non-Indians within the boundaries of the Cheyenne River Sioux Tribe [sic] for any offense; and

(2) Defendants have no jurisdiction to exclude non-Indians from hunting on fee lands or public lands and waters within or purportedly within the Cheyenne River Sioux Reservation, including land and water areas taken by the United States for the building of the Oahe Reservoir.

(3) In the alternative to paragraphs (1) and (2) above, that the reservation has been diminished by the federal acts taking lands and overlying waters for the reservoir and, if found to be necessary, by the tribal members' consent to the federal actions.

* * *

Plaintiff's Second Amended Complaint, p. 9 (February 6, 1989).

South Dakota contends that Congress intended to disestablish the reservation boundaries when the subject lands were taken out of trust status and conveyed either to nonmembers or the United States. In the alternative, the State argues that treaty rights conferring regulatory authority upon the Tribe over hunting and fishing by nonmembers have been abrogated and that

inherent Indian sovereignty does not necessitate tribal civil jurisdiction over this matter. Finally, the State interprets the tribal defendants' admonition as threatening impermissible criminal prosecution if sportsmen fail to comply with tribal licensing regulations. Thus, even if the Tribe has jurisdiction over nonmembers, the State argues that the defendants would exercise tribal jurisdiction in a manner proscribed by law.

The tribal defendants point to past cases which have held that no disestablishment of the reservation boundaries occurred. In addition, they argue that those acts of Congress which allowed the transfer of tribally-owned lands to nonmembers or the federal government reserved tribal jurisdiction over all persons hunting and fishing on those lands. The defendants also assert that, because tribal civil jurisdiction

derives from rights and powers inherent in the Tribe as a sovereign government, they have the authority to enforce tribal licensing regulations against nonmembers because the Tribe has always retained power over all hunting and fishing within the reservation. Finally, the tribal defendants deny that they would impose criminal sanctions against nonmember violators as the Cheyenne River Sioux Tribal Court has held that it may impose only civil sanctions against nonmembers.

Having considered carefully the contentions of all involved, the Court finds that, while the lands removed from trust status did not disestablish the reservation boundaries, the Tribe nonetheless has no civil jurisdiction over the hunting and fishing activities of nonmembers on those lands. The tribal defendants, therefore, are permanently enjoined from area or fee lands and from

imposing tribal game licensing regulations upon them.

BACKGROUND

I

The Cheyenne River Reservation lies wholly within Dewey and Ziebach counties in north-central South Dakota, bordered on the east by the Missouri River. Early in the fall of 1988, representatives of the South Dakota Department of Game, Fish and Parks submitted a proposed agreement for the 1988 Dewey-Ziebach deer hunting season to the Tribe. The State later submitted a second proposed agreement after negotiations with the Tribe. During these negotiations, tribal representatives expressed concern that the proposal did not adequately protect the grazing permit rights of tribal members on a strip of land adjacent to the Missouri River called the "taken area." The Tribe sought to include a provision requiring that any nonmember wishing to hunt

on the taken area must first secure tribal permission. The State refused to grant this concession.

The State filed its complaint after tribal representatives issued this announcement to the local media:

> DUE TO THE STATE OF SOUTH DAKOTA'S INTRANSIGENCE, ALL HUNTERS MUST NOW HOLD A CHEYENNE RIVER SIOUX TRIBAL HUNTING LICENSE TO HUNT ON ANY AND ALL LANDS WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION. THE STATE LICENSES WILL NO LONGER BE HONORED AND VIOLATORS ARE SUBJECT TO PROSECUTION IN TRIBAL COURT.

The tribal defendants initially sought to dismiss the complaint. The Court, by order and accompanying memorandum opinion filed July 3, 1989, denied the motion. Although the parties addressed the issue whether the sanctions threatened by the tribal defendants against nonmember violators were criminal in nature, the Court focused on whether the United States and the Tribe itself were indispensable parties who could not be sued

under the doctrine of sovereign immunity. Guided by Fed.R.Civ.P. 19, this Court concluded that, notwithstanding that sovereign immunity prohibited maintaining the action against either the United States or the Tribe itself, the United States and the Tribe were not indispensable parties to the lawsuit.[2] The Court adheres to its earlier ruling.

II

The treaty of April 29, 1868, 15 Stat. 635 (1868) (hereafter 1868 Fort Laramie Treaty) established the boundaries of the Great Sioux Nation. Out of this vast territory, Congress later set aside for the

---

[2]This Court noted (1) that the interests of the United States would not be impaired and that equity and good conscience warranted continued litigation; and (2) that the complaint targeted conduct of the tribal defendants as outside the scope of their authority. Dismissal for failure to join the Tribe was improper because the question whether the tribal defendants were acting beyond their authority was the precise question to be addressed at the trial on the permanent injunction motion.

Tribe what is now the Cheyenne River Reservation. Act of March 2, 1889, 25 Stat. 889 (1889) (hereafter Act of 1889).

Not all the land within the reservation is owned by the Tribe, its members or held in trust by the United States on their behalf.[3] This relinquishment of title resulted from various federal programs which either encouraged nonmember settlement or furthered national public projects. Today, the reservation consists of approximately 2,806,914 acres of which slightly less than half are held in trust for the Tribe. About 1,411,000 acres of non-trust land passed out of trust status as a result of acts of Congress.

---

[3]Trust lands are lands allotted to individual Indians and held by the United States in trust for them, see Burke Act of 1906, 34 Stat. 132 (codified at 25 U.S.C. § 349), or held by the United States for the benefit of the Tribe itself.

The Act of 1889 allotted to individual Indians parcels of land with title in the United States in trust for the allottee for twenty-five years. Following the issuance of fee patents by the Secretary of the Interior of Indian allottees, many of these allotted lands were acquired by nonmembers of the Tribe through sale or inheritance. A large amount of unallotted land considered by Congress to be surplus land was later taken out of trust status as a result of the Act of May 29, 1908, 35 Stat. 460 (1908) (hereafter Act of 1908). This Act allowed nonmembers to hold the property and claim fee title to lands lying within the reservation boundaries. The Acts of 1889 and 1908 took approximately 1,307,000 acres of reservation land out of trust status.

Congress also acquired certain trust lands for flood control on the Missouri River. The Oahe reservoir was built pursuant to the Flood Control Act of 1944, 58 Stat. 886

(hereafter Flood Control Act). The United States Supreme Court traced the history of the Flood Control Act in ETSI Pipeline Project v. Missouri, 484 U.S. 495, 108 S. Ct. 805, 98 L.Ed.2d 898 (1988), and noted that it was conceived to remedy two distinct water problems on the Missouri River Basin watershed. South Dakota, like other states in the upper Basin region, experienced difficulties in developing Missouri River water for agricultural and industrial purposes, while states in the lower Basin region experienced seasonal skirmishes with flood control and navigation. Id. at 499.

The Flood Control Act was a compromise between proponents of two comprehensive plans for the project -- the Pick Plan and the Sloan Plan. Among other things, the compromise plan provided for six main-stem reservoirs on the Missouri River. The largest of these, the Oahe Dam and Reservoir Project, would enable

"'the irrigation of 750,000 acres of land in the James River Basin as well as . . . provide useful storage for flood control, navigation, the development of Hydroelectric power, and other purposes.'" Id. at 502 (citing S. Doc. No. 247, 78th Cong., 2d Sess., 3 (1944)). Building the Oahe dam and reservoir required the Cheyenne River Tribe to relinquish 104,420 acres of valuable bottomland--"the greatest acreage given up by any tribe to facilitate the construction of a main stem dam on the Missouri River in South Dakota . . . ." Herbert T. Hoover, Professor--Department of History, University of South Dakota, "Cheyenne River Sioux Tribe: Taking Area History," p.1 (Exhibit 93).

III

In the case at bar, the parties filed pre- and post-trial memoranda on the issues to be addressed by the Court. The Court also heard from the United States amicus curiae. A

six-day bench trial ensued wherein the Court heard the testimony of twenty witnesses and received in evidence 267 exhibits. In addition to the factual and procedural background as set forth above, the Court makes the following specific factual findings:

1. About 1,395,729 acres, or 46.5 percent, of the Cheyenne River Reservation is deeded in fee to members and nonmembers. Approximately 3.7 percent of the reservation consists of lands taken by the United States for use by the Oahe Dam and Reservoir Project. The remaining 49.8 percent of the reservation is held in trust with 442,944 acres consisting of individual allotments which remain in trust and 952,782 acres comprising tribal trust lands. The Court makes no finding as to the percentage breakdown of member and nonmember ownership of the deeded lands.

2. The trust lands are interspersed throughout the reservation but are more

densely located along the taken area. About two-thirds of the trust lands border the Missouri and Cheyenne Rivers on the eastern and southern boundaries of the reservation.

3. Of the 1980 population of 7,636 persons within Dewey and Ziebach counties, Indians constituted 58 percent and whites constituted 42 percent of that total. 1990 statistics are not yet available nor is there any breakdown as to the population percentages of members and nonmembers on the Cheyenne River Reservation.

4. The Tribe has always asserted jurisdiction over all hunting and fishing activities on the reservation, including nonmember fee lands and the taken area.

5. The Tribe has not acquiesced to any State assertion of jurisdiction over hunting and fishing activities on the reservation. Beginning with the passage of the Indian Reorganization Act of 1934, 48 Stat. 984, the

Tribe enacted ordinances, promulgated under the authority of Article VII of the Tribal By-Laws and approved by the Bureau of Indian Affairs (BIA), which required nonmembers to obtain a tribal permit to hunt or fish on the reservation.

6. Prior to this lawsuit, both the Tribe and the State enforced their respective game and fish regulations on the lands in dispute. The Tribe enforced its regulations against all violators while the State limited its enforcement efforts to nonmembers.

7. No evidence was presented that the Cheyenne River Sioux Tribal Court has imposed criminal sanctions upon a nonmember who violated the tribal game ordinances.

8. The Tribe has the right to graze stock on the taken area subject to the corresponding use by the United States Army Corps of Engineers.

9. The Tribe exercises its grazing rights according to the terms of its tribal grazing code. This code, approved by the BIA, allows the Tribe to allocate range units to permittees with the grazing permit issued by the BIA. See 25 C.F.R. part 166 (1989). The grazing unit permittee leases only the grass and cannot refuse to allow a tribal member access to the taking area land for reasonable hunting or fishing purposes, though tribal members are encouraged to inform the permittee beforehand of their intended activity. All of the taking area lands within the reservation have been leased.

10. Hunting and fishing for subsistence purposes by members of the Cheyenne River Tribe is an important cultural, social, and religious activity. Lakota tradition exhorts able-bodied tribal members to care for the needy, weak, and elderly. Not only does subsistence hunting and fishing further that

tradition, it honors a fundamental Lakota philosophy of courage, wisdom, and generosity. Hunting and fishing also were necessary to the survival of the early American Indians.

11. Despite the importance to tribal members of hunting and fishing for subsistence purposes, it does not appear that subsistence hunting and fishing is widely practiced by present Cheyenne River Sioux Indians.

12. Tribal regulation of nonmember hunting on the taken area and nonmember fee lands is not necessary to protect hunting by tribal members for subsistence purposes. Deer harvested by nonmember hunters on the taken area and the nonmember fee lands does reduce the amount of deer available to tribal members. This reduction, however, does not decrease subsistence hunting by members as few deer are harvested by members for subsistence purposes.

13. The State has established that the Tribe itself, in setting licensing fees and season

limits, places greater management emphasis on recreation hunting than on subsistence hunting. The tribal wildlife management program does not monitor subsistence hunting nor has the Tribe ever closed a season with the stated purpose of assuring adequate subsistence hunting as opposed to assuring adequate recreational hunting by tribal members.

14. Only a small amount of hunting by tribal members is conducted for subsistence purposes, therefore, hunting activities of nonmembers on the taken area and fee lands would not make it more difficult for tribal members to successfully subsistence hunt on the reservation.

15. The past subsistence needs of tribal members have been met despite nonmember hunting on the taken area and fee lands. Indeed, often more big game and small game tribal licenses were sold to nonmembers than

to members. Thus, the taken area and fee lands are not substantial food sources for tribal members.

16. Tribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by tribal members for subsistence purposes. The State proved that subsistence fishing by members on the taken area is not a substantial source of food for tribal members.

17. Tribal lands contribute to the well-being of the deer herds on the taking area and on nonmember fee lands. Virtually all the land adjacent to the taking area is trust land. As a white tail deer may move up to twelve miles across its home range, all reservations lands, whether trust, deeded or public, sustain deer populations. An effective state or tribal wildlife management program necessarily must encompass the entire reservation.

18. Generally nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten the legitimate tribal concerns for livestock grazing and protection of other property. Although nonmembers may have harassed cattle grazing on the taken area or on tribal lands, failed to close pasture gates, or let down wires on fences, this conduct has not been so extreme and pervasive as to warrant extraordinary enforcement efforts by state or tribal game officers. Hunting and fishing by members on these lands has resulted in many of the same unlawful or improper acts towards the personal property of landowners and grazing permittees.

19. Federal agencies like the BIA, the U.S. Fish & Wildlife Service, and the U.S. Army Corps of Engineers cooperate with state and tribal governments in promoting fish and wildlife conservation and public recreation.

For example, federal funds are made available through the Dingell-Johnson Act, 16 U.S.C. § 777 (1989), the Endangered Species Act, 16 U.S.C. § 1531, and the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450 et seq. (1975) (hereafter Indian Self-Determination Act). South Dakota, through its Pheasants for Everyone program, complements the Conservation Reserve Program, 7 C.F.R. part 704 (1990), of the Agricultural Stabilization and Conservation Service by contracting with farmers to grow wildlife food plots on idled CRP land.

20. Neither the State nor the Tribe can lay claim to a program of wildlife management without crediting federal agencies with some financial and management assistance. Moreover, federal assistance is not an intimation of regulatory jurisdiction.

21. The economic security of the Cheyenne River Tribe would not be threatened if prohibited from regulating the hunting and fishing activities of nonmembers on the deeded lands and taken area. Although the Tribe has regulated nonmember sportsmen on the reservation, it has not been successful in developing a recreational hunting and fishing industry that would generate revenues to defray the cost of a large-scale management program. Preservation and development of tribal resources is carried out primarily by enforcement of tribal regulations.

22. In the 1930's and the 1940's the Tribe had made significant inroads into wildlife management. Notwithstanding its earlier success, inadequate funding has prevented the tribe from sustaining an independent and vigorous scheme of wildlife management on the reservation. Certain management activities of the Tribe, like fish stocking and exchange

programs, have been limited and little documentation exists since 1984.

23. Until 1989, no ongoing fish or wildlife surveys for the collection of harvest and population date were conducted by the tribal game, fish and parks department. Also, the Tribe had no established conservation, depredation, or stocking programs to protect and enhance existing fish and wildlife resources.

24. A single wildlife biologist employed by the Aberdeen-area BIA was available to advise and assist the tribe. This biologist also serves fourteen other reservations in three states, all under the administration of the Aberdeen-area BIA office. Except for the BIA wildlife biologist, tribal conservation personnel have little or no background in biology or wildlife management. For example, training courses in wildlife management for tribal game wardens were virtually nonexistent

before 1989. As a result, the tribal council has had to rely upon estimates and recommendations of state game officials in setting bag and season limits.

25. In 1989, the Tribe contracted for wildlife biologist and management consultant services with Lower Brule Wildlife Enterprise. Funding for assistance in developing a wildlife management program was requested by the Tribe prior to November 1988 and later was provided by the Department of the Interior pursuant to a P.L. 638 contract with the Tribe.

26. The tribal wildlife management program written by the contract biologist service employs scientific data collection and management techniques. The reservation-wide program seeks to maximize annual harvestable surpluses to meet the present and future economic, recreational, and aesthetic needs of tribal members. No data compilations or

reports are available yet to gauge the program's strengths and weaknesses, nor is there any evidence as to the successful implementation of the new wildlife management plan.

27. After the needs of tribal members have been met, the tribal wildlife program provides for consumptive and non-consumptive opportunities for others.

28. The Tribe has been unsuccessful in developing the Oahe fishery. Little revenue is raised by the sale of fishing licenses to nonmembers and other fishing-related development, i.e., campgrounds, resorts, tourist attractions, bait shops and novelty items, is virtually nonexistent.

29. The State of South Dakota implemented a comprehensive wildlife regulatory program in the early years of its statehood. The function and structure of the South Dakota Department of Game, Fish and Parks has

expanded to serve changing public and environmental demands since that time.

30. Recreational hunting generates revenues sufficient to justify substantial expenditures for South Dakota's wildlife management program.

31. The State has a large staff of highly educated and experienced wildlife conservation personnel. The wildlife surveys for the area are comprehensive scientific tools for monitoring harvest and population data. State programs for habitat improvement, depredation control, and wildlife conservation, including pervasive law enforcement measures and field-level recommendations by conservation officers, have been successful in promoting manageable wildlife populations in Dewey and Ziebach counties.

32. Fisheries management is an integral part of the State's general recreation plan. Lake Oahe boasts of a spawning and imprint station

above the dam in the Whitlock reservoir. Walleye and northern pike fishing in the Lake Oahe area are recognized as among the best in the nation. South Dakota stocked the Oahe area with approximately 72 million fish during the period from 1970 to 1988, including a wide array of sport fishing species like rainbow trout, smallmouth bass, walleye, and chinook salmon. Fish stocking studies monitor the success of a particular stocking effort. The State conducts fish population surveys for use in determining its fishing regulations as well as studies to determine fishing pressure, catch rates and harvest information on the lakes on the Missouri River. Numerous other studies and surveys monitor particular aspects of fisheries management on Lake Oahe. In addition, the State submits annual Missouri River water level recommendations to the Corps of Engineers with the goal of improving recreational fishing and protecting endangered

species. Enforcement of fishing regulations also furthers fisheries management. Finally, South Dakota invests a substantial sum of money, along with joint funding from various federal programs, in developing its recreational fishery on Lake Oahe. In return for its investment, the State generates substantial revenue through the sale of licenses and through enhanced tourism.

33. Neither the taken area nor the fee lands constitute a pristine area. The Tribe has never denied general nonmember access to the taking area or fee lands nor does the Tribe monitor nonmember access to the taken area or fee lands. In addition, there has been no showing by the Tribe that unique cultural, spiritual, or religious significance attaches to the taken area or the fee lands.

34. The Tribe has no general scheme to define the essential character of the reservation lands. Nonmember fee lands are interspersed

throughout the reservation in a checkerboard fashion. The reservation consists primarily of range and farm land. There is little industrial development and only a few sparsely populated communities.

35. The Tribe discriminates against nonmembers in the application of its hunting and fishing programs. Discrimination in setting season limits is most obvious in the deer seasons with restrictions upon nonmembers regarding season closings and deer type, sex and age that are not applicable to member hunters.

36. The tribal game, fish and parks department sets licensing fees and season limits without regard to member subsistence hunting and in a manner which discriminates against nonmembers. The discriminatory licensing fees apply to nearly every animal hunted or trapped on the reservation. These

restrictions apply whether the lands being hunted are trust, deeded or public lands.

37. The State hunting program, on the other hand, does not discriminate against Indian or nonmember hunters in setting fees and season limits. In addition, state conservation programs, like the Pheasants for Everyone program and the predator program, encourage participation by both members and nonmembers.

38. The State does not discriminate against members or nonmembers fishing on the Missouri River. State fish stocking efforts include rivers that run through the reservation.

39. The Cheyenne River Tribe's political integrity will not be diminished as it still retains exclusive regulatory jurisdiction over the trust land and regulatory jurisdiction over its members throughout the reservation.

40. In sum, the Tribe need not regulate the hunting and fishing activities of nonmembers on the taken area and the nonmember fee lands

to protect its political integrity, economic security, or health or welfare.

ISSUES

The following issues are presented by the record in this case:

I. Did the Tribe threaten impermissible criminal sanctions against those nonmembers who violate the tribal licensing regulations?

II. Were the Cheyenne River Reservation boundaries disestablished as a result of the Act of 1908 and the Cheyenne River Act?

III. Does the Tribe have civil jurisdiction to regulate hunting and fishing by nonmembers on the taken area and nonmember fee lands?

DISCUSSION OF ARGUMENTS AND AUTHORITIES

I

The Court first turns to the question whether enforcement of the tribal game

ordinance would include the imposition of criminal sanctions against nonmembers. A tribe's criminal jurisdiction over its members is "part of retained tribal sovereignty, not a delegation of authority from the Federal Government." Duro v. Reina, 110 S. Ct. at 2060; see also United States v. Wheeler, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978). The opposite is true in relations with nonmembers, though, because tribes lack the power to prescribe and enforce rules of conduct against nonmembers through criminal sanctions. As sovereigns dependent upon the dominant political will of the federal government, "Indian tribes . . . necessarily give up their power to try nonmember citizens of the United States except in a manner acceptable to Congress." See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978). Thus Congress must affirmatively delegate to a

tribe criminal jurisdiction over nonmembers. Id. Inasmuch as Congress created federal criminal jurisdiction over offenses committed by nonmembers in Indian country, which includes all land within the limits of the reservation, no grant of criminal authority over nonmembers exists in the tribes. 18 U.S.C. §§ 1151 et seq. Indian tribes must look to Congress or the states for prosecution of crimes committed by nonmembers upon Indian lands. See Duro, 110 S. Ct. at 2057 n.1; Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360) (hereafter P.L. 280).

In this action South Dakota seeks to prohibit the tribal defendants from asserting criminal jurisdiction over nonmembers who are in violation of tribal licensing regulations. This Court previously declined to dismiss this count of the complaint on the grounds that its

disposition should await the parties' factual presentation. Having reviewed the briefs on the motion for dismissal and having heard the testimony at trial, this Court concludes that the State's first count must be dismissed for lack of a justiciable case or controversy under Article III of the U.S. Constitution.

Throughout this litigation the tribal defendants have disavowed any criminal jurisdiction over nonmembers, claiming that the available sanctions are purely civil in nature. The State, on the other hand, asserts that tribal enforcement of its hunting and fishing code will be accomplished through impermissible criminal sanctions. However that may be, this Court cannot speculate as to whether tribal enforcement of its game ordinances will be accomplished through civil or criminal sanctions when no actual conflict has been presented by the State.

The tribal defendants raise the specter of National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985), for the proposition that scrutiny of the enforcement provisions of the game ordinance rests initially with the tribal court. Indeed, National Farmers supports this position, saying:

> . . . [T]he existence and extent of a tribal court's jurisdiction will require will require a careful examination of tribal sovereignty . . . .
>
> * * *
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.

Id. at 856.

According to the evidence presented at trial, the Cheyenne River Sioux Tribe Court has never imposed criminal sanctions upon nonmember transgressors. Moreover, a recent decision of the Tribal Court unequivocally limits tribal enforcement over nonmember hunting and fishing activities on the reservation "by means of civil ordinances and laws . . . ." Cheyenne River Sioux Tribe v. Key, slip op. at 4 (Cheyenne River Sioux Tribal Court filed Jan. 31, 1990). Without commenting on the source of authority upon which the Tribal Court relies in reaching its conclusion, the decision ultimately restricts tribal sanctions against nonmembers to those generally recognized as civil in nature.

The tribal enforcement provisions do not establish a brightline between the available civil and criminal penalties. But, until this Court is called upon to determine whether an actual judgment of the Tribal Court exacts a

criminal rather than a civil penalty against a nonmember violator of the tribal game ordinance, this purported controversy lacks "sufficient immediacy and reality." Granville House, Inc. v. Department of H.E.W., 772 F.2d 451, 455 (8th Cir. 1985), appeal after remand, 796 F.2d 1046 (1986), vacated, 813 F.2d 881 (1987). See also, Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1, 6 (9th Cir. 1974); Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987). Dismissal of the State's first prayer for relief therefore is warranted at this time.

II

The second issue to be addressed by the Court is whether Congress has altered the reservation boundaries thereby depriving the Tribe of jurisdiction over nonmember activities on the disestablished lands. Subject to certain limitations, a tribe can

exercise civil regulatory authority over conduct that takes place only on its reservation. If Congress has disestablished the reservation boundaries and has not reserved tribal regulatory authority, the tribe has no jurisdiction over Indian or nonmember activities on the disestablished portion. But, if no disestablishment has occurred, "treaty-established jurisdiction would preempt the application of state . . . laws on the reservation, . . . except to the extent that the Tribe's rights have been abrogated by subsequent congressional action." Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 815 (8th Cir. 1983), cert. denied, 464 U.S. 1042, 104 S. Ct. 707, 79 L. Ed. 2d 171 (1984) (citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977); DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975)).

Other courts, including the United States Supreme Court, frequently have addressed disestablishment questions of this nature. An intention to disestablish reservation boundaries is not lightly imputed to Congress. Instead, Congress must affirmatively alter established reservation boundaries in unmistakable terms. See Rosebud Sioux Tribe v. Kneip, 430 U.S. at 586; DeCoteau v. District County Court, 420 U.S. 444; Lower Brule Sioux Tribe v. South Dakota, 711 F.2d at 815-16. The "face of the Act" or "the surrounding circumstances and legislative history" must be examined to divine Congress' intent. Mattz v. Arnett, 412 U.S. 481, 505, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). Finally, "traditional solicitude for the Indian tribes" directs that any legislative ambiguity or doubtful expressions of disestablishment must be resolved in their

favor. See Solem v. Bartlett, 465 U.S. 463, 472, 104 S. Ct. 1161, 79 L. Ed. 2d 443 (1984).

A

The United States Supreme Court held in Solem v. Bartlett, supra, that the Act of 1908, which opened to settlement 1.6 million acres of surplus or unallotted lands in the Cheyenne River Reservation, did not affect the original reservation boundaries established by the Act of 1889. Bartlett, 465 U.S. at 481. See also United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded on other grounds, 446 U.S. 980, 100 S. Ct. 2959, 64 L. Ed. 2d 836 (1980); United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); and United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). The Bartlett Court held that Congress did not expressly state that the allotment would result in a disestablishment of the original boundaries and that neither the legislative history nor

any later congressional action clearly indicates such a disestablishment. Bartlett, 465 U.S. at 481. Because reservation lands owned in fee by nonmembers passed to them directly or indirectly as a result of the Act of 1908, the Tribe may have civil jurisdiction on the deeded lands within the originally-established boundaries.

B

Moreover, there is no "substantial and compelling evidence of a congressional intent to disestablish Indian lands" taken as a result of the Act of September 3, 1954, Pub. L. No. 83-776, 68 Stat. 1191 (hereafter Cheyenne River Act). See Bartlett, 465 U.S. at 472. On this issue, the Court finds instructive the Eighth Circuit Court of Appeals' opinion in Lower Brule Sioux Tribe v. South Dakota, supra. An examination of the takings accomplished by the Big Bend Act, Pub. L. No. 87-734, 76 Stat. 698 (1962), and the

Fort Randall Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958) [sister Acts to the Cheyenne River Act], led the appeals court to conclude that no disestablishment of the Lower Brule Indian Reservation had occurred. See Lower Brule, 711 F.2d at 821.

Like the Big Bend and Fort Randall Acts, the Cheyenne River Act was one of seven taking statutes enacted to compensate the tribes and their members for Flood Control Project lands taken by the Corps of Engineers. Id. at 813 n.1 (citations to Acts). Lower Brule held that despite Congress' use of the words "as diminished" in four of the taking statues when referring to the reservation -- including the Cheyenne River Act -- no congressional intent to disestablish was found in the Big Bend and Fort Randall Acts. Lower Brule attributed the different wording found in the statutes to diverse formats and drafting styles rather than evidence of a variation in

congressional intent. Id. at 821 n.13. Significantly on this point, the Eighth Circuit stated:

> . . . the district court's conflicting conclusions on the disestablishment question with regard to the Fort Randall and Big Bend Acts imputes to Congress a very impractical and unlikely purpose with respect to flood control on the Missouri River. If the court below was correct, it would mean that in acquiring the land necessary for the comprehensive Missouri River Basin Project through the seven taking statutes . . . Congress in the first Act . . . and the last two Acts . . . preserved existing reservation boundaries, but in the middle four Acts . . . by inclusion of the words "as diminished," it did not do so. There simply is no indication that Congress intended to create such an unusual and impractical result.

Id. at 820-21.

South Dakota nevertheless asserts that the Cheyenne River Act expressly disestablished the reservation. In relevant part, § 11 of the Cheyenne River Act states as follows:

> . . . The lands so selected and purchased as substitute allotments may be either within the boundaries of the Cheyenne River Reservation as diminished by this agreement or outside said reservation as may meet the desires of the individuals involved in the several transactions.

68 Stat. 1191, § 11 (emphasis supplied).

Conceded that in the light of Solem and Lower Brule this statement by itself does not satisfy the "unmistakable terms" requirement for a disestablishment, the State contends that other provisions of the Cheyenne River Act in combination with the above-quoted sentence lead to a conclusion that Congress clearly intended a disestablishment of the reservation. Notably, § 1 of the Cheyenne River Act provides that the Tribe:

> . . . does hereby convey to the United States all tribal, allotted, assigned, and inherited lands or interests within said Cheyenne River Reservation belonging to the Indians of said reservation . . . .

68 Stat. 1191, § 1.

According to the State, the Tribe's transfer of all title and interest in the project lands to the federal government worked a disestablishment of the reservation along the taken line of the Missouri River. South Dakota's interpretation of § 1, however, is incompatible with later sections of the Cheyenne River Act which expressly reserve in the Tribe specific rights and interests in the taken lands. For example, § 6 provides for the Tribe's retention of mineral rights in the taking area. Section 7 reserved the right to cut and remove timber from the taken area. Finally, § 10 provides that tribal members shall have grazing rights in the taking area and "the right of free access to the shoreline of the reservoir, including the right to hunt and fish in and on the aforesaid shoreline and reservoir[.]" In sum, a conveyance to the United States of all of the Tribe's interests in the project lands is not a clear expression

of disestablishment of the reservation boundaries when followed by a litany of reserved rights and privileges.

Moreover, § 2 of the Cheyenne River Act provides for a sum certain to be paid to the Tribe, "in final and complete settlement of all claims, rights, and demands of said Tribe or allottees[.]" 68 Stat. 1191, § 2. The Eighth Circuit twice has ruled that a nearly identical provision fell short of a clear expression to alter a reservation's boundaries. See Lower Brule, 711 F.2d at 816-17, 819; United States v. Wounded Knee, 596 F.2d 790 (8th Cir.), cert. denied, 442 U.S. 921, 99 S. Ct. 2847, 61 L. Ed. 2d 289 (1979). With little discussion, the Appeals Court concluded that "[t]his language falls short of that utilized by Congress when it has unequivocally expressed its intent to disestablish a reservation's boundaries." Such brevity is compelling and, in this case,

correct. Far from a clear expression of intention to disestablish reservation boundaries, the face of the Cheyenne River Act is ambiguous, and at best equivocal, on this subject.

The Act's legislative history does not evince a congressional intention to alter reservation boundaries. The "as diminished" language of § 11 received identical treatment by the Senate and House Committees on Interior and Insular Affairs. The report of the House Committee provided simply that the "lands so purchased as substitute allotments may be either within or without the boundaries of the Cheyenne River Reservation", entirely omitting the "as diminished" language of the bill. H.R. Rep. No. 2484. 83d Cong., 2d Sess. 8. A report of the Department of the Army, which was included in the Committee Report, did not even discuss § 11. Id. at 9-12. The attached report of the Secretary of the Interior,

however, included the "as diminished" phrase when it recommended that substitute allotments be conveyed in "restricted fee" to the individual Indians. Id. at 14. Yet that report does not elaborate on the disestablishment of reservation boundaries.

In the Senate, the report of the Committee on Interior and Insular Affairs also omitted the "as diminished" language of § 11 in its sectional analysis of the bill. See S. Rep. No. 2489, 83d Cong., 2d Sess. 5. And the reports of the Secretary of the Interior and the Department of the Army run true to form with their reports to the House Committee. Id. at 8, 9-12. Significantly, though, all the committee reports do not elaborate on the effect of the Cheyenne River Act upon the reservation boundaries. In sum, the legislative history of the Cheyenne River Act reflects little, if any, treatment of the disestablishment question.

Finally, circumstances surrounding the taking of the reservation lands do not support a finding of disestablishment. Before it could be effective, § 1 of the Cheyenne River Act, included at the behest of the Tribe, required strict observance of Article 12 of the Treaty of April 29, 1868. Article 12 requires a three-fourths vote of approval by tribal members before any cession of reservation lands can be valid and enforceable against them. The following excerpt from a Memorial presented by the Tribe to Congress, conveyed its concerns if the Cheyenne River Act was not ratified by the required number of votes:

> If we should now abandon our insistence that three-quarters of the adults ratify the Act which results from the Oahe bills, we would be abandoning our own Treaty. We would be consenting to a violation of Article XII of that Treaty. It would be a shameful thing for us, as one of the divisions of the Sioux Nation, to abandon and break Article XII of the

> 1868 Treaty. We have for so many years insisted and still are insisting that the 1868 Treaty and Article XII thereof govern our land claim. From our side we do not wish to be branded as traitors by the people of the Reservations who live by and under the Treaty of 1868.
>
> But what about the Government of the United States? Does the Department of the Interior wish to have conveyed part of the title or a questionable title or an invalid title? Does the Interior Department wish to lay the basis for future litigation? . . .

Memorial to the 83rd Congress in regard to Oahe Project South Dakota, S. 695 and H.R. 2233, presented by the Negotiating Committee of the Cheyenne River Sioux Tribal Council, 3-4 (May 20, 1954) (see Hearing before the Joint Senate-House Committee on Interior and Insular Affairs, S. Doc. No. 695, H.R. Doc. No. 2233, 83rd Cong., 2d Sess. 215 (May 20, 1954)) (hereafter Tribal Memorial). Congress acquiesced and the Cheyenne River Act was later approved by 92 percent of the voting tribal members.

The Tribal Memorial points to a desire on the part of the Tribe to finally and completely convey to the United States those lands required for the Oahe Reservoir. The tribal vote does not, however, express unmistakably a desire to alter existing reservation boundaries. The fact that the Tribe voted to convey limited title to lands necessary for the federal project does not positively denote a relinquishment of tribal jurisdiction over those lands. "Congressional action removing certain reservation land from Indian ownership does not necessarily disestablish reservation boundaries." Lower Brule, 711 F.2d at 815. A change in reservation boundaries, therefore, is not imperative to diminishing the land size of a reservation. See Condon v. Erickson, 478 F.2d at 688.

In its discussion of § 11, the Tribal Memorial makes clear that the Tribe did not

contemplate the disestablishment of reservation boundaries as a result of the takings. The Tribe understood that the Interior Department was "endeavoring to terminate the trust status of a very large body of land" within the reservation. Tribal Memorial at 24. The Tribe's only concern was with the continued trust status of substitute allotments and not with the possible disestablishment of its reservation boundaries. Ostensibly, then, the disestablishment issue did not even command the attention of the Tribe itself, which says something of its prominence in the formation of the Oahe bills to be voted upon.

The Cheyenne River Act did not disestablish the Missouri River boundary of the Cheyenne River Reservation. The face of the Act itself is not "'precisely suited' to evince Congress' intent to disestablish reservation boundaries." Lower Brule, 711

F.2d at 816. Nor do the legislative history of the Act and the circumstances surrounding its passage and implementation point unmistakably to the conclusion that Congress intended to exclude the taking area from the Cheyenne River Reservation. Id. at 815.

III

The last issue to be resolved is whether the Tribe has the authority to regulate hunting and fishing by nonmembers on lands owned by nonmembers or the United States but which lie within the boundaries of the reservation. The following discussion of general Indian law principles leads this Court to conclude that tribal civil jurisdiction does not reach the hunting and fishing activities of nonmembers on the fee lands or taken area.

A tribe's powers in relations between it and its members upon its territory are akin to those of a sovereign nation. See United

States v. Wheeler, supra. The powers of a tribe in relations between it and nonmembers are diminished, however, because of its dependence upon the federal government. The tribe as quasi-sovereign is divested of any inherent power to exercise criminal jurisdiction over nonmembers. Duro v. Reina, 110 S. Ct. 2053, 58 U.S.L.W. at 4645; Oliphant, 435 U.S. at 212. Although the tribe's civil jurisdiction over nonmembers is not so divested, its power to regulate generally the conduct of nonmembers on reservation lands no longer held by or for the benefit of the tribe or its members is greatly diminished. See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. ---, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989) (plurality opinion); Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984). The United

States Supreme Court has identified three situations in which the exercise of tribal civil jurisdiction over nonmembers on non-tribal land may be appropriate: (1) where Congress has expressly delegated jurisdiction to the tribe; (2) where a nonmember has essentially consented to tribal jurisdiction through a business relationship or otherwise; and (3) where the conduct of the nonmember imperils the tribe's political integrity, economic security, or health and welfare. Id.

To rule on the case as pleaded first requires that the Court dispose of two side issues raised in the briefs. Initially, this Court need not engage in a lengthy abrogation analysis as was required of the Eighth Circuit in Lower Brule. See Lower Brule, 711 F.2d at 821-27. The district court in Lower Brule erroneously concluded that South Dakota possessed exclusive jurisdiction to regulate hunting and fishing by all persons within the

Fort Randall and Big Bend taking area. See Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 287 (D.S.D. 1982), rev'd, 711 F.2d 809 (8th Cir. 1983). The basis for this conclusion was that a disestablishment of the Lower Brule reservation had occurred and that tribal jurisdiction over hunting and fishing by tribal members had been abrogated by Congress. But this Court has not been called upon to decide whether the Tribe has regulatory jurisdiction over hunting and fishing by tribal members on the taken area and on nonmember fee lands within the reservation. Although the State raised that issue in its trial brief, the State's complaint asks only that the Court declare the extent of tribal jurisdiction as it affects nonmembers on the lands in dispute.

Second, the question of state jurisdiction on the taken area or fee lands has been raised in the briefs and orders of

the Court. However, the State, limited to its complaint, has not asked this Court to decide whether South Dakota has jurisdiction over nonmember hunting and fishing on the taken area and nonmember fee lands. The tribal defendants succinctly stated the limits of the Court's inquiry:

> It is important to note that this case does not involve the question of whether the state may also have jurisdiction over non-Indian activities on the taking area and deeded lands. The state, of course, is the plaintiff in this case. Its complaint seeks only to prohibit the exercise of tribal jurisdiction, not to establish the existence of state jurisdiction. . . . Nor did the tribal defendants counter claim for such relief. . . . Thus the pleadings in this case are insufficient to raise the question of whether the exercise of state jurisdiction on the reservation lands is preempted by tribal jurisdiction. That is how the parties tried the case as well. The state, for example, made no attempt to show how its interests would be injured if the tribe were to exercise exclusive jurisdiction over the areas in dispute. Similarly, the evidence presented by the tribal defendants was aimed at

> demonstrating the need for tribal jurisdiction and not whether state jurisdiction should be precluded because it interferes with the achievement of tribal and federal objectives.

Tribal Defendants' Post Trial Memorandum, p. 5 (February 26, 1990).

The State disagrees with this statement. This Court, however, concludes that this case does not involve issues of preemption or tribal regulatory authority over nonmembers on tribal lands. See, e.g., Cotton Petroleum Corp. v. New Mexico, 490 U.S. ---, 109 S. Ct. 1698, 104 L. Ed. 2d 209 (1989); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 130 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 102 S.

Ct. 3394, 73 L. Ed. 2d 1174 (1982). Thus, the Court's attention turns to the single question before it: whether the Tribe can regulate hunting and fishing by nonmembers within the taken area and upon nonmember fee lands.

A

The United States Supreme Court previously has addressed the issue whether a tribe has authority to regulate hunting and fishing by nonmembers on nonmember fee lands within the reservation. Montana v. United States, supra, involved a claim by the Crow Tribe of Montana that it, and not the state, had the authority to regulate hunting and fishing by nonmembers on non-Indian lands within reservation boundaries. In holding for the state, the Montana Court articulated a presumption that the relational law of the federal government and Indian tribes provides that the "exercise of tribal power beyond what is necessary to protect tribal self-

government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[4] Montana, 450 U.S. at 564. See also Mescalero Apache Tribe v.

---

[4]Termed the "implied limitations doctrine" this tenet posits that retained sovereign powers of the Indian tribes were limited but not abolished as a result of their dependence on the United States. See F.Cohen, Handbook of Federal Indian Law 231 (1982) ed.) Certain retained powers were explicitly divested by treaty or congressional act. See Note, Tribal Power to Zone Nonmember Land Within Reservations: The Uncertain Status of Retained Tribal Power Over Nonmembers, 21 Ariz. St. L.J. 769, 774-79 (1989). Other powers were implicitly divested, however, as inconsistent with the dependent status of tribes. Cf. Oliphant, supra. Generally, inconsistent powers are those involving the external relations of a tribe. See e.g., United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); Knight v. Shoshone & Arapaho Tribes, 670 F.2d 900 (10th Cir. 1982); Cardin v. DeLaCruz, 671 F.2d 363 (9th Cir. 1982). Thus, Montana has not been applied by the Supreme Court in cases involving tribal sovereignty over tribal members on tribal land, i.e., matters of internal relations. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed. 2d 10 (1987).

Jones, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886) (United States may govern tribes within the geographical boundaries of the Nation by acts of Congress rather than controlling them by treaties).

The United States Supreme Court is divided over the issue whether Montana reverses traditional Indian law principles by establishing a presumption that tribes lack civil jurisdiction over nonmembers unless such authority is affirmatively delegated by Congress. This division was apparent in the Court's recent opinion in Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, supra. In the separate opinions of Justices White and Blackmun, the presumption

issue surfaced when both sought to clarify Congress' role in authorizing tribal regulatory jurisdiction over nonmembers.

As the author of the decision of the Court as to the "open area," Justice White relied on Montana and Wheeler as support for the principle that, where "[a]n Indian tribe's treaty power to exclude nonmembers of the tribe from its lands" has been abrogated, Congress must affirmatively delegate to the tribe civil jurisdiction over nonmembers for such authority to exist. Brendale, 109 S. Ct. at 3006. Implicit divestiture of authority follows as "regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status . . . ." Id.

Joined in his opinion by only two other members of the Court, Justice Blackmun argued that Justice White's reading of the "general principle" fashioned in Montana ignores a

longstanding presumption which retains tribal civil jurisdiction to regulate nonmember conduct on the reservation. Id. at 3018. Justice Blackmun wrote, "'Civil jurisdiction over . . . activities [of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'" Id. at 3020 (citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987)).

Justice Blackmun stated, however, that "to recognize that Montana strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands is not to excise the decision from our jurisprudence." Brendale, 109 S. Ct. at 3021. The case still protects "significant tribal interests" which are "threatened or directly affected" as a result of on-reservation conduct by nonmembers. Id.

at 3022. Therefore, Montana's misreading of Indian-law jurisprudence is, in effect, offset by its solicitude for sovereignty jurisprudence. Id.

The effect of these opinions on Montana is unclear, and the opinion of Justice Stevens does little to clarify the discussion. Justice Stevens, who delivered the opinion of the Court in Brendale as to the "closed area," asserted that the power to exclude nonmembers from reservation lands includes the lesser power to determine the essential character of the area through land use regulation. Brendale, 109 S. Ct. at 3010. Derived from inherent Indian sovereignty and rights guaranteed it by treaty, a tribe's exercise of its power to define the character of the tribal community may entail the regulation of nonmember activities on lands owned by them. Id. Although the "unadulterated character" of the closed area required tribal zoning

authority over nonmembers, Justice Stevens concluded that the tribe had no similar interest in the open area. Id. at 3015.

Justice Stevens focused on the zoning authority context of Brendale and distinguished Montana on its facts. Montana did not "require a different result" because in that case the hunting and fishing regulation discriminated against nonmembers, the nonmembers' conduct did not threaten the welfare of the tribe, and the state had significant ownership and management interests in the property where the nonmember activity would be carried out. Id. at 3014.

In short, Montana remains viable case law precedent. With this in mind, Montana cannot be distinguished from the facts of this case. This case does not involve land use regulation, i.e., zoning, whereby the purported use of the property by the nonmember would be different than that of any tribal

member generally -- both members and nonmembers use the taken area and fee lands for hunting and fishing. This Court found that nonmember hunting and fishing activities pose no more threat to grazing livestock than does the similar conduct of tribal members. The Tribe's licensing regulations are discriminatory, preferring the needs of tribal members before those of nonmembers, both in the issuance of licenses and the fees charged. In addition, the Court found that the present dispute does not concern lands which, if severed from tribal control, would corrupt a uniquely Indian community. Finally, a significant portion of the reservation is owned by nonmembers and the United States. This Court, in looking to federal law as a source of regulatory jurisdiction, must apply the "general principle" propounded in Montana: unless Congress expressly delegated civil jurisdiction to the Cheyenne River Tribe over

nonmember hunting and fishing on the taken area and the nonmember fee lands, no such authority exists in the Tribe. Montana, 450 U.S. at 564. Cf. Application of Otter Tail Power Co., 451 N.W.2d 95, 101 (N.D. 1989) (examined Brendale and applied express congressional delegation analysis).

1

Article 2 of the 1868 Fort Laramie Treaty granted the Cheyenne River Tribe the "absolute and undisturbed use and occupation" of the territory reserved for it by Congress. This treaty further granted a tribal right to exclude nonmembers from its reservation and, implicitly, to "define the essential character" of the tribal community. See Brendale, 109 S. Ct. at 3010 (opinion of Justice Stevens). But Congress later championed other national interests by enacting legislation which encroached upon the Tribe's right to exclusively use and occupy

its reserved territory. In advancing its allotment policy,[5] Congress passed the Act of 1889 which made it possible for lands originally allotted to tribal members to eventually pass by sale or inheritance to nonmembers. Yet the Act retained the reservation status of alienated land. See Mattz v. Arnett, supra. See also Note, Undermining Tribal Regulatory Authority: Brendale v. Confederated Tribes, 13 U. Puget Sound L. Rev. 349 (1990). Thirty years later Congress further diminished tribal ownership of reservation lands when it passed the Act of 1908 and opened unallotted or surplus lands to non-Indian homesteading. Finally, more reservation lands were taken along the Missouri River by the United States pursuant to the Flood Control and Cheyenne River Acts.

---

[5] See General Allotment Act of 1887, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331 et seq.); Solem v. Bartlett, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

As a result, the Tribe could no longer exclude any person from lands owned by nonmembers or the United States.

A final consequence of each of these Acts was to alienate certain lands from the Tribe for the benefit of nonmember settlers or for the United States. As was made clear in Montana:

> . . . treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands. Accordingly, the language of the 1868 [Fort Laramie] treaty provides no support for tribal authority to regulate hunting and fishing on land owned by the non-Indians.

Montana, 450 U.S. at 561. See also Brendale, 109 S. Ct. at 3003-04 (Justice White's discussion of Yakima Treaty of 1859).

The Act of 1908 reserved for the Cheyenne River Indians "any benefit to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act." 35 Stat. 464, § 9 (emphasis supplied).

But, because the Tribe alienated certain reservation lands pursuant to the allotment policy regulatory power in the Tribe over those lands now held in fee by nonmembers would be inconsistent with the Act. The 1868 Fort Laramie Treaty did not grant the Tribe civil jurisdiction over hunting and fishing on land owned by nonmembers. Dispositive of the nonmember fee lands issue is the fact that nowhere in the Act of 1908 does Congress expressly delegate to the Tribe the authority to regulate hunting and fishing by nonmembers on allotted lands.

2

Turning to the taken area, the avowed purpose of the Cheyenne River Act was the acquisition of those lands necessary for the construction of the Oahe Dam and Reservoir Project, not, as was the goal of the Act of 1908, "the ultimate destruction of tribal government." Montana, 450 U.S. at 506 n.9.

The Cheyenne River Act dealt primarily with payment to the Tribe for damages resulting from the flooding of its valuable bottomlands. The sum of $10,644,014 was appropriated in payment for the taken lands and interests therein. Including loss of wildlife, grazing permit revenue loss, the rehabilitation of all tribal members, the relocation and reestablishment of the displaced tribal members, and the cost of negotiating the agreement. 68 Stat. 1191, §§ 2, 5, and 13. Other unspecified sums were to be appropriated for the relocation of cemeteries and the relocation and reconstruction of Cheyenne River Agency, hospitals, schools, and other public buildings and roads. Id. at §§ 3-4.

Federal damages relief commanded the lion's share of the debate and the negotiations. An appraisal made by Gerald T. Hart and Associates (hereafter Hart appraisal) concluded that the Oahe Dam and Reservoir

Project would require the taking of 104,420 acres of the Cheyenne River Reservation at a fair market value of $1,605,410. The Hart appraisal was unacceptable to both the Department of the Interior and the Tribe and negotiations ensued to reach an agreement of the value of the land and interests to be conveyed. See S. Rep. No. 2489, 83rd Cong., 2d Sess. 3. Subsequent hearings before the Senate and House Committees, and negotiations with the Corps of Engineers, the Missouri River Basin investigation staff, and a delegation from the tribal council concentrated on the issue of damages, without discussion of tribal authority over nonmember activities on the taken area. See generally House of Representatives, Hearings Before the Committee on Interior and Insular Affairs, Joint Senate and House Subcommittee on Indian Affairs, on H.R. 2233 and S. 695 (May 19, 1954); Tribal Memorial (May 20, 1954); Frank

Ducheneaux, et al., "Oahe: Report of Washington Delegation" (January 21-31, 1953); Missouri River Basin Investigation Project No. 138, "Damage to Indians of Five Reservations from Three Missouri River Reservoirs in North and South Dakota," (April 1954). On the collateral issue of damages, the Court notes that, though the Cheyenne River Act compensated the Tribe for grazing permit revenue loss, the failure of the United States to make additional appropriations to the Tribe for loss of wildlife revenue does not implicitly grant it the right to control wildlife resources and the use thereof by nonmembers.

The Cheyenne River Act expressly granted tribal members certain rights and privileges incidental to hunting and fishing within the exterior boundaries of the reservation. The Act provides in § 10:

> . . . [T]he said Indian Tribe and the members thereof shall have the right to graze stock on the land between the level of the reservoir and the taking line. . . . The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

68 Stat. 1191, § 10.

Nevertheless, an inescapable consequence of the Cheyenne River Act was the transfer of fee ownership from the Tribe to the United States and the abrogation of the Tribe's treaty right to the exclusive use and occupation of the taken lands. The language of the Cheyenne River Act reveals no congressional intention, either express or implied, to delegate to the Tribe civil jurisdiction over nonmembers on the taken area. While § 10 confers hunting and fishing rights upon the Tribe, those rights are

restricted regarding the "corresponding use by other citizens of the United States," meaning, presumably, nonmembers.[6] Giving the words their ordinary meaning, the Court concludes that § 10 does not affirmatively authorize the Tribe to exercise civil jurisdiction over nonmembers on the taken area.

---

[6]This is not to say that § 10 expressly endorses the application of state civil jurisdiction over the recreational activities of nonmembers. The Eighth Circuit concluded that an identical "corresponding use" clause in both the Fort Randall and Big Bend Acts:

> does not clearly and unambiguously subject the hunting and fishing rights of the Lower Brule Sioux to state regulations. Indeed, the clause makes no explicit reference to state law, and thus, the "regulation" contemplated could be either by the federal government through the Secretary of Army and Corps of Engineers or by the State.

Lower Brule, 711 F.2d at 824.

What is relevant here is not whether this clause grants South Dakota regulatory jurisdiction over nonmembers on the taken area, but whether it expressly delegates that authority to the Tribe.

The legislative history surrounding the passage of the Cheyenne River Act does not compel a different conclusion. The reports of the Secretary of the Army to the House and Senate committees on Interior and Insular Affairs recommended that § 10 be eliminated as it "would involve complications since there are numerous tracts within the reservation which are owned by non-Indians." H.R. Rep. No. 2484, 83d Cong., 2d Sess. 11.; S. Rep. No. 2489, 83d Cong., 2d Sess 12. Otherwise, the agency reports on the bill submitted to Congress request no change. There is no mention of tribal jurisdiction over nonmember hunting and fishing.

An examination of the myriad hearings and negotiations which were held prior to the passage of the Cheyenne River Act illuminates only one instance where a discussion of § 10 addressed tribal jurisdiction on the taken area. Counsel for the Tribe, Mr. Ralph Case,

made this remark in a hearing before the joint Senate and House committee:

> Now, the right to hunt and fish is a tribal right. It is still preserved and is still holding. No white citizen of South Dakota can go on this reservation and hunt unless he has first obtained a license from the Tribal Council. Our right to continue hunting and fishing is to us an extremely valid and valuable right. It is an ancient right. It is all that is left of our lives as they existed a hundred years ago.

Hearings before the Committee on Interior and Insular Affairs, S. 695 Joint Hearing, Acquisition of Lands for Oahe Reservation and Indian Rehabilitation, 289 (May 20, 1954).

Read in context, however, it is the Court's understanding that Mr. Case was referring to tribal jurisdiction at the time of the hearing and was not alluding to future jurisdiction of the Tribe over nonmember hunting and fishing once the lands were

actually taken.[7] Thus, Mr. Case's use of the word "Now" should preface every statement made in the excerpted paragraph. In any event, this isolated statement falls short of the affirmative congressional action contemplated by Montana.

Circumstances surrounding the Cheyenne River Act indicate that the jurisdiction issue simply was not considered. The Tribal Memorial recommends passage of the bill as submitted and fails to address any jurisdictional conflicts which might result therefrom. In addition, a comprehensive

---

[7]The first comments of Mr. Case with regard to § 10 converge on the grazing rights issue. Whether the United States would take fee title to the taken area or merely a flowage easement was a subject of grave concern to tribal members with grazing interests in the bottomlands and required the attention of the committee. Except for the comments of Mr. Case on the continued hunting and fishing rights of the Tribe, however, none of the committee members asked questions on this provision or contributed to the discussion in any way.

report from the Missouri River Basin investigation staff of the Department of the Interior discussed in depth the economic impact upon the Indians which would result from the Oahe and Fort Randall Dam and Reservoir Projects, but also failed to comprehend the jurisdictional problems created by the bill. See generally Missouri River Basin Investigation Project No. 138, "Damage to Indians of Five Reservations from Three Missouri River Reservoirs in North and South Dakota," (April 1954).

It is equally clear that other legislation read in pari materia with the Cheyenne River Act did not grant tribal jurisdiction over nonmembers on nonmember fee lands or the taken area. The Indian Reorganization Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 et seq.), acknowledged and reaffirmed the governmental authority of the Tribe. This Act

sought "to encourage economic development, self-determination, cultural plurality, and the revival of tribalism." F. Cohen, Handbook of Federal Indian Law 147 (1982 ed.). The Tribe's adoption of the provisions of the Indian Reorganization Act did not expand reserved treaty rights, but instead preserved existing treaty rights. The same can be said of P.L. 280 which did not change state jurisdiction over the on-reservation activities of nonmembers nor did it authorize civil jurisdiction over nonmember hunting and fishing on the taken area and fee lands. The statute merely preserved the scope of then-existing tribal jurisdiction. See Bryan v. Itasca County, 426 U.S. 373, 387, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967, 103 S. Ct. 293, 74 L. Ed. 2d 277 (1982); White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1279 (9th Cir. 1981).

Finally, 18 U.S.C. § 1165, the federal trespass statute, authorizes federal jurisdiction over the taken area solely because the Cheyenne River Act granted tribal members hunting and fishing rights on the project lands. This trespass statute expands federal, not tribal, jurisdiction. See generally New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337-38, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983).

The Court is cognizant of the detrimental effect the Cheyenne River Act had upon the Tribe and concurs with this statement by the tribal defendants:

> . . . [I]t is plain that the Cheyenne River Sioux Tribe and its members sacrificed the best lands of their reservation in order that this federal project might be built. Whatever the value of the Reservoir to the nation as a whole, it conveyed no benefit on the tribe or tribal members. To the extent that Public Law 776 [Cheyenne River Act] is ambiguous, it should be interpreted in a fashion that allows the fullest possible protection of the rights that the tribe retained.

Tribal Defendants' Post Trial Memorandum, p. 89 (February 26, 1990). Indeed, the Cheyenne River Act should be construed so as to defend those rights retained by the Tribe. But it cannot be ignored that the right to exclude or regulate nonmembers on land which is owned by the United States for the benefit of the general public is extraneous to the 1868 Fort Laramie Treaty and subsequent federal legislation affecting those treaty rights. The Court, in completing an examination of the Cheyenne River Act, must conclude that, although the Cheyenne River Act acquired only those property interests necessary to the construction of the Oahe Dam and Reservoir Project, Congress did not affirmatively delegate civil jurisdiction to the Tribe over nonmember hunting and fishing activities on the taken area.

In an exhaustive examination of the Flood Control Act and the Act of September 30, 1950, 64 Stat. 1093 (hereafter Act of 1950), the State traces each Act's history to a conclusion that jurisdiction over nonmembers on the taken lands rest with the State. Without commenting on this conclusion, the Court finds instead that neither Act takes an affirmative step towards delegating jurisdiction over nonmember hunting and fishing on the taken area to the Tribe. The Court's inquiry is limited to whether Congress expressly delegated jurisdiction to the Tribe, not whether Congress intended jurisdiction to pass to the State, or, for that matter, the federal government.

Both the Flood Control Act and the Act of 1950 concerned the acquisition of project lands and the interests to be conveyed to the United States. There is nothing in the Acts themselves or their discussion on the floors

of Congress and in committee that raises the specter of tribal jurisdiction over nonmembers on the taken lands.

Congress, pursuant to § 1 of the Flood Control Act, invoked the dominant jurisdiction of the United States over "the rivers of the Nation" and authorized the construction of works to improve navigation and flood control. The Act accommodates the interests of the affected states in continued access to and use of the rivers and shorelines. The rights of Indian tribes were set aside for the moment as Congress addressed the specific interests of the various states and tribes through subsequent legislation.[8]

---

[8]The parties focused much attention on § 4 of the Flood Control Act of 1944. Section 4 allows general public use of the project reservoirs subject to regulation by the Corps of Engineers. The final sentence of § 4 states:

> No use of any area to which this section applies shall be permitted which is

(continued...)

[8](...continued)
inconsistent with the laws for the protection of fish and game of the state in which such area is situated.

The Eighth Circuit in Lower Brule disagreed with the district court's conclusion that § 4 of the Flood Control Act of 1944 authorized the application of South Dakota's laws to hunting and fishing activities by tribal members in the Fort Randall and Big Bend taking area. Lower Brule, 711 F.2d at 825 n.23. In concluding that the provision authorized federal, not state, regulation, the Eighth Circuit noted that, "there is simply no indication in the Legislative history that Congress even considered Indian rights when it adopted section 4." Id. This observation lead to this statement by the Court:

> The "inconsistent use" provision in section 4, however, might well be relevant to the issue of whether the Tribe or the state has jurisdiction to regulate hunting and fishing by nonmembers within the Fort Randall and Big Bend taking areas. See New Mexico v. Mescalero Apache Tribe, ___ U.S. ___, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983); Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Because we remand this issue to the district court . . . we need not here determine the relevance of section 4 to the question of
>
> (continued...)

Finally, the Act of 1950 was enacted merely to authorize the Army and Interior Departments to negotiate a contract with the Tribe for the purchase of project lands. The best that can be said of the Act is that it sought to preserve treaty hunting and fishing rights, though South Dakota would disagree with this statement. But, again, treaty-reserved hunting and fishing rights did not expressly delegate tribal regulatory authority over nonmembers on lands within the reservation that were owned by the United States for the general public. The Court can

[8](...continued)
jurisdiction over nonmembers of the Tribe.

Id.

One of the issues facing this Court is whether the Tribe has jurisdiction over nonmember hunting and fishing on the taken area. According to Montana, § 4 is relevant only to the extent that it fails to expressly authorize the application of tribal law over nonmembers.

only conclude then that the Act of 1950 fell short of the express congressional delegation of authority required by Montana.

In looking at the preceding discussion, no affirmative action of Congress subjects nonmembers who are hunting or fishing on nonmember fee lands or on the taken area to the civil jurisdiction of the Tribe.

3

The tribal defendants contend that denying the Tribe jurisdiction over the taken area and fee lands runs afoul of the Lacey Act, 16 U.S.C. §§ 3371 et seq. Section 3372 provides in relevant part:

(a) It is unlawful for any person --

> (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law . . . .

16 U.S.C. § 3372(a)(1) (1981).

A recent Eighth Circuit opinion concluded that a nonmember's failure to obtain a tribal fishing license and subsequent violation on taken lands was chargeable under the Lacey Act. United States v. Big Eagle, 881 F.2d 539 (8th Cir. 1989), cert. denied, --- U.S. ---, 110 S. Ct. 1145, 107 L. Ed. 2d 1049 (1990), involved a nonmember Indian caught engaging in commercial fishing without a license on the Lower Brule Reservation taken area. Indicted under the Lacey Act, Big Eagle argued that he was not in violation of any Indian tribal law because the Lower Brule Tribe had no regulatory jurisdiction over him. The Eighth Circuit disagreed, however, stating that "the crucial inquiry is whether the acts complained of took place within the reservation and not, as Big Eagle insists, whether the Lower Brule Tribe itself has the power to prosecute." Id. at 541. The Lacey Act essentially authorizes federal jurisdiction over all reservation

lands without regard to the membership status of a defendant or the power of a tribe to enforce its regulations. Id. Thus, Big Eagle decided only that the United States has jurisdiction over all persons on all lands within the reservation and did not resolve any question of the scope of tribal jurisdiction over nonmembers on the taken area. This holding is consistent with the legislative history of the Act. See H.R. Rep. No. 276, 97th Cong., 1st Sess. 14; S.Rep.No. 123, 97th Cong., 1st Sess. 5.

The Lower Brule tribal law consisted of a settlement agreement between it and the State which required the purchase of either a state or tribal fishing permit. Big Eagle, 881 F.2d at 541. Because of this settlement agreement, the Appeals Court rejected any attempt to read Big Eagle as intimating its position with regard to future state-tribal jurisdictional conflicts:

> Thus, we do not find it necessary to decide the questions left open in Lower Brule. It would be inappropriate to do so in a case where the State of South Dakota is not a party, and where the necessary historical and administrative evidence has not been submitted. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983); Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

Id. at 542 n.2.

Nevertheless, the tribal defendants argue that it should have jurisdiction over all persons on the taken and fee lands because the effect of Big Eagle is that tribal licensing requirements ultimately will be enforced -- by either the Tribe or the United States. But this is irrelevant to the State's complaint. The scope of the federal government's prosecutorial powers under the Lacey Act is unrelated to the question whether the Tribe can exclude nonmembers from the taken area or fee lands. A recognition that the United

States may choose to enforce tribal regulations against nonmembers on all reservation lands does not force a concession from this Court, that like jurisdiction must therefore exist in the Tribe. See 16 U.S.C. § 3378(c)(3).

B

Congressional delegation of authority is not the exclusive source of tribal civil jurisdiction over nonmembers on lands within the reservation. The United States Supreme Court pronounced two "exceptions" to Montana's general principle when it wrote:

> Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means,

> the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct on non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. . . .

Montana, 450 U.S. at 565 (citations omitted).

No "consensual relationship" exists here as nonmember hunters and fishermen on nonmember fee land and the taken area "do not enter any agreements or dealings with the [Cheyenne River] Tribe so as to subject themselves to tribal civil jurisdiction." Id. The Tribe, therefore, may have civil authority over hunting and fishing activities by nonmembers on the taken lands or the nonmember fee lands only if that conduct

"imperils" "significant tribal interest."[9]

[9]This section source of regulatory authority has been called an "exception" to Montana's general rule. See, e.g., Brendale, 109 S.Ct. at 3018 (Justice Blackmun); Note, Undermining Tribal Land Use Regulatory Authority: Brendale v. Confederated Tribes, 13 U. Puget Sound L. Rev. 349, 357 (1990); Note, 21 Ariz. St. L.J. at 777 (cite in note 3). Whether self-government and internal relations create an exception to the implied limitations doctrine, supra, n.3, or are an independent basis for tribal jurisdiction, this alternative source of civil authority flows from the inherent powers retained by tribes as dependent sovereigns. Doctrinal developments in Indian law evolved from early American sovereignty jurisprudence which recognized the international law of nations to subject all persons within their borders to laws that further legitimate political, social, and economic interest. See F. Cohen, Handbook of Federal Indian Law 232 (1982 ed.). An anomaly exists, however, in the relations of tribes within the United States which permits them less than the "full attributes of sovereignty." McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 173, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). The tribes as conquered nations lost their right to determine external relations and retained only the "power of regulating their internal and social relations." Id. Any exercise of power beyond that necessary to territorial management, according to principles of Indian law, must be granted by Congress.

(continued...)

Brendale, 109 S. Ct. at 3008, 3018. This Court has previously stated in its findings of fact, however, that tribal regulation of hunting and fishing by nonmembers on the two types of land at issue does not pose a threat to the political integrity, the economic security, or the health and welfare of the Cheyenne River Tribe.

The success of the tribal game and fish management program and the protection of tribal hunting and fishing interests does not depend upon the Tribe's ability to regulate nonmember hunting and fishing activities on the two types of land involved in this case. Even though tribal lands contribute to the well-being of wildlife throughout the

[9](...continued)
The Ninth Circuit has applied Montana with the most frequency. See, e.g., Confederated Tribes & Bands of Yakima Indian Nation v. Whiteside, 828 F.2d 529, 534 n.1 (9th Cir. 1987), aff'd in part, rev's in part, 492 U.S. ___, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989).

reservation, such is the nature of game management between states as well. Thus, it is not necessary for the Tribe to regulate nonmembers on the taken area and fee land to effectively manage game populations throughout the reservation. It must be remembered that the Tribe's programs to enhance game and fish populations encompass the entire reservation because it still retains jurisdiction over its members throughout the reservation. As both the Tribe and the State are ultimately concerned with the effective management of game populations -- the Tribe over its reservation, the State over Dewey and Ziebach counties -- negotiation and compromise still may be required to some extent.

Nonmember conduct on the taken area and fee lands does not jeopardize the efficacy of hunting and fishing by tribal members for subsistence purposes. Subsistence activities of tribal members are not weighed by tribal

conservation personnel when establishing season and bag limits. In fact, subsistence hunting and fishing is not monitored by the Tribe at this time.

A paramount tribal interest in the recreational activities of its members on the fee lands and taken area does not exist, except insofar as it generates additional revenues. Yet loss of revenue from sales of hunting and fishing licenses to nonmembers would not imperil the economic security of the Tribe. The tribal game and fish management program is funded almost entirely through P.L. 638 contracts with the BIA. 25 C.F.R. § 271.32 (1989). The Tribe realizes little revenue from the purchase of fishing licenses by nonmembers. Moreover, the Tribe has failed to develop the Oahe fishery for its own gain despite the fact that, in the past, it has asserted jurisdiction over all persons on the taking area.

Tribal regulation of nonmember hunting and fishing on the taken area is not necessary to protect the Tribe's interest in issuing grazing permits for "sustained yield management and development" and in its tribal members' grazing livestock and other property. Title XV, Cheyenne River Sioux Tribe Grazing Code, p.1 (1988-1993). While the Tribe cooperates with the BIA in safeguarding its members' grazing permits, grazing livestock and other Indian property can be adequately protected through the United States, the state of South Dakota, or reciprocal tribal agreements. See Duro, 110 S. Ct. at 2065-66 (discussing sources of lawful authority to punish nonmembers). The Tribe and the State adequately monitor the hunting and fishing activities of persons on the taken area to prevent such abuses.

This Court must conclude therefore that the Cheyenne River Tribe has no significant

interests bearing on its internal relations which necessitate the assertion of regulatory authority over nonmembers on non-trust lands.

CONCLUSION

The boundaries of the Cheyenne River Reservation as established by the Act of 1889 remain unaltered. And though the Tribe has the treaty power to exercise regulatory jurisdiction over tribal members throughout the entire reservation. Congress has not expressly delegated to the Tribe hunting and fishing jurisdiction over nonmembers on lands within the exterior boundaries of the reservation which are held in fee by nonmembers or which were taken by the United States for the construction of the Oahe dam and reservoir. Finally, tribal regulatory authority over nonmembers on these lands is not necessary to protect and political integrity, economic security, or health and welfare of the Tribe. Accordingly, the tribal

defendants are permanently enjoined from attempting to exclude nonmembers from hunting and fishing on nonmember fee lands or the taken area within the Cheyenne River Reservation, or in any way attempting to regulate such activities.

The Court makes no finding and reaches no conclusion as to the exercise of state jurisdiction over nonmembers on the fee lands and the taken area, see California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), or as to the reach of tribal civil jurisdiction over nonmembers on trust land, see Merrion v. Jicarilla Apache Tribe, supra. This memorandum opinion constitutes the Court's findings of fact and conclusions of law.

BY THE COURT:
/s/ Donald J. Porter
CHIEF JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STATE OF SOUTH DAKOTA,

Plaintiff,

vs. CIV. 88-3049
JUDGMENT

WAYNE DUCHENEAUX, personally and as Chairman of the Cheyenne River Sioux Tribe, and LENITA MINER, personally and as Director of Cheyenne River Sioux Tribe Game, Fish and Parks,

Defendants.

The findings of fact and conclusions of law of the Court in the above action were filed with the Clerk of this Court in a memorandum opinion on August 21, 1990. It is now

ORDERED that the Judgment of the Court is rendered as set out in the memorandum opinion.

Dated August 22, 1990.

ATTEST:
WILLIAM F CLAYTON, CLERK
By /s/ Carol L. Merrill
Deputy

BY THE COURT:
/s/ DONALD J. PORTER
CHIEF JUDGE

Exhibit 3

FISH AND GAME REGULATIONS

GOVERNING FISHING, HUNTING, AND TRAPPING WITHIN THE BOUNDARIES OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA.

Be it enacted by the Cheyenne River Sioux Tribal counsel in regular meeting, assembled on August 5, 1937.

Section I. Permits required or Licenses. It shall be unlawful for any nonmember of the Cheyenne River Sioux Tribe of Indians to fish or hunt within the Reservation except as hereinafter provided, without first having procured a Reservation permit to do so and then only during the respective periods of the year as provided by the State laws, Federal Migratory Bird Treaty and Tribal Ordinances. Members of the Tribe shall abide by the Federal Migratory Bird Treaty Act and shall fish and hunt upland birds only during the

respective periods of the year as provided by the State Laws.

Section II. Permits to Use Seines or Nets. Catching Fish Except with Pole, Line and Hook. Use of Seines. Penalties. No person, including members of the Tribe, shall take or catch in any of the streams, lakes or ponds of the Reservation except with a pole in hand, line and hook, nor shall any person including members of the tribe take or catch fish with a hook baited with any poisonous substances or by means of dams, or by the use of fish traps and grab hooks, seines or similar means for catching fish.

. . .

Section VIII. Trapping of Beaver. Any person, before trapping, taking, or killing beaver in any manner, on the Cheyenne River Reservation shall make application to the Tribal Council for a permit to take, kill or trap, such beaver, and shall state in said

application the description of the land, lake or stream from which the beaver are to be taken.

The Tribal Council shall have full power to approve, or disapprove said application, and shall have full power to designate the number of beaver which may be taken upon such land, lake or stream, for which the permit may be granted.

Said permit, when granted, shall be written in triplicate, original being delivered to the permittee, one copy to be retained by the Indian Agency Office, and one copy to be mailed to the State Fish and Game Commission, Pierre, South Dakota.

Said beaver skins taken under such permit shall be delivered to the Office of the Indian Agency, and shall be stamped with a rubber stamp in indelible ink on the inside of the skin, or tagged with a metal tag, which tag shall be locked or sealed so as to be

incapable of removal, except by destruction of the tag, and which stamp or tag shall be evidence that such beaver skins have been legally taken upon the Indian Reservation, and such skins so stamped or tagged may be sold, traded, or used in any manner upon the Indian Reservation, but may not be transported or sold off the Reservation without first having been tagged by the State Fish & Game Commissioner, with such tags as are issued by said Fish & Game Commission, which tags may be obtained upon the copy of the permit which has been filed with the Fish & Game Commission, at such cost as is prescribed by the State Game Laws.

Permits, when issued by the Tribal Council shall be nontransferable.

Any fur buyer, firm or corporation, when purchasing furs from Indians on the Cheyenne River Reservation, shall file a report with the Indian Agency Office setting forth the

species of such furs purchased, number of furs purchased, and shall report any and all furs purchased on the Reservation or from any person, either Indian or White.

It shall be unlawful for any Indian to sign any affidavit or statement, that he has trapped, killed or taken beaver skins on the Reservation which skins have not been taken under a permit issued by the Tribal Council to said Indian making such affidavit or statement.

. . .

Section XII. Big Game. Closed season is hereby extended on the Cheyenne River Reservation on all big game animals including deer and antelope.

. . .

Section XVI. Summary. The main provisions of this Ordinance are herewith set forth in condensed form for the purpose of

informing persons interested in the principal features.

1. All persons shall procure a license or permit, to hunt, fish or trap.

2. All persons shall abide by the Federal Migratory Bird Treaty.

3. Members of the Tribe shall not be required to secure permits to fish, or hunt upland birds.

ORDINANCE GOVERNING NONMEMBERS VIOLATING FISH AND GAME REGULATIONS

Be it enacted by the Cheyenne River Sioux Tribal Council in regular meeting assembled on August 5, 1937.

Any person not subject to the jurisdiction of the Cheyenne River Sioux Indian Court who violates any provision of the "Fish and Game Regulations Governing Fishing, Hunting and Trapping within the Boundaries of the Cheyenne River Indian Reservation, South Dakota," shall be turned over to the custody of any Federal or State Law enforce-officer for prosecution under Federal or State Law. Any License issued to such person shall be suspended forthwith pending revocation or other action by the Tribal Council.

The foregoing Ordinance was adopted by the Cheyenne River Sioux Tribal Council on September 8, 1937, at a regular meeting of the Tribal Council by a vote of 12 for and 0

against, and shall be effective from the time of approval of this Ordinance by the Superintendent of the Cheyenne River Agency or the Secretary of the Interior, in accordance with Article IV, Section II of the By-laws of the Cheyenne River Sioux Tribe in South Dakota and Article IV, Section I, (1) of the Cheyenne River Sioux Constitution, approved on December 27, 1935, pursuant to the Act of June 18, 1934 (48 Stat. 984).

Dated: September 16, 1937.

/s/ Luke Gilbert
Chairman, Cheyenne River Sioux Tribal Council
Approved: W.F. Dickens, Supt.
Dated: September 16, 1937

Exhibit 61

ADVANCEMENTS IN WILDLIFE MANAGEMENT ON INDIAN LANDS

Laurits W. Krefting
U.S. Fish and Wildlife Service
St. Paul, Minnesota

In 1941, the U.S. Fish and Wildlife Service was given the responsibility of carrying out wildlife research on Indian lands. Since that time, biologists of this Service have been making surveys of the major reservations and working toward a better appreciation and understanding of wildlife management problems on these lands. This work has been done under the Interior Department interbureau agreement of August 7, 1941, between the Office of Indian Affairs, the Indian tribes and the Fish and Wildlife Service. Their problems have been approached by studying the animals as well as by acquiring a knowledge of the Indians' concept of wildlife as a utility rather than as

recreation. This paper summarizes the accomplishments that have been made in assisting the various tribes in the Lake States and the Dakotas in managing their wildlife resources. In this area there are approximately 8 million acres of Indian land with a population of some 75,000 Indians.

Until recently the animal population has been on a downward trend on many reservations in this area. This has been due to an unwillingness on the part of the Indians to restrict themselves in harvesting their wildlife crops and to their lack of concern in planning for the future. Since the passage of the Indian Reorganization Act of 1934, the tribes which accepted its provisions are becoming more self-governed than previously. Hence, they have been able to formulate constitutions and by-laws which give them the power to set up restrictive regulations for managing their wildlife. Due to the fear of

losing their ancient trapping, hunting, and fishing rights, progress in inaugurating game ordinances has been slow. However, progress has been made during the past 4 years in changing this concept. While only eight tribal councils have adopted game ordinances to date, these are in effect on approximately 6 million acres or 75 per cent of the Indian land in this region. These ordinances are concerned chiefly with the actions of non-Indians on Indian lands but they also contain limited provisions respecting the conservation of wildlife by Indians. On many reservations, ordinances would be ineffective due to their small size or to the scattered nature of the land ownership. State game laws are in effect on the large proportion of such areas that is under non-Indian ownership.

Education in wildlife conservation.--When the work on Indian lands was initiated, education in wildlife conservation was

recognized to be of basic importance in establishing plans for future wildlife management. In carrying out this program, much attention has been given to visual education through the use of movie films. This visual aid was made possible through cooperative agreements between the conservation departments of Minnesota and Wisconsin, the South Dakota A and M College and the U.S. Fish and Wildlife Service. Approximately 300 showings have been made in 19 school systems to approximately 51,000 students and adults. Special movies of wildlife-conservation projects on Indian lands have also been taken during the past 4 years. Films will be prepared from this photographic material for demonstrating the process made by Indians in wildlife management. Prepared film strips on conservation subjects have also been furnished to schools.

Advantage was also taken of every opportunity to present talks to students and adults and to assist school superintendents in organizing courses of study. Lists of books were prepared for classroom use and for libraries and copies of some of the better books were circulated in the schools. Special teaching aid outlines were also supplied to the schools. Since published material from the Indian conservation viewpoint was very limited, a wildlife reader was prepared by one of the Indian school teachers. This reader is now being used in a number of the reservation schools.

To stimulate more interest in wildlife conservation, one of the schools carried on a pheasant-rearing project while another operated fish rearing pond. Among the adults, a sportsmen's club has been organized and there are prospects that other groups will be likewise.

Big game.--Although it is generally assumed that Indian reservations have been depleted of their big game, this is not true in all cases. Recent surveys on the more important reservations in this region indicate a total big game population of approximately 12,130. This total includes the following species: white-tailed deer, 10,500; mule deer, 370; moose, 80; elk, 80; antelope, 300; and the black bear, 800.

On the Rosebud Reservation in South Dakota, protection against hunting has made it possible for the deer to increase at a rapid rate. A regulated open season was possible for the first time in the fall of 1944. During that season 32 Indians purchased tribal licenses and in spite of unfavorable weather, they bagged 23 buck deer. The younger men were very enthusiastic about the hunt but the older ones felt that the license fee entitled them to a deer regardless of how or when they

got it. This is another example to show that the younger Indians are beginning to think of wildlife in terms of sport while the older individuals still cling to the concept of game as a utility.

White-tailed deer on the Cheyenne River Reservation in South Dakota has been protected since 1937. In 1942, the herd was estimated at 90 and at 200 in 1945. Within a few years it will be possible to have an open season there under a permit system.

The deer herd on the Grand Portage Reservation in Minnesota has been estimated at about 400 during the past few years and it has only been necessary to provide protection for them during the summer months. Non-Indians are also permitted to hunt on this reservation during the regular state seasons provided they obtain a permit from the tribal council and reside at the Indian lodge.

Antelope on the Cheyenne River Reservation have been protected since 1937 and this herd has been on the increase since that time. In 1942, the population was estimated at 200, while in 1945 it was believed to have increased to about 250. Seventy-five per cent of this reservation is suitable for antelope, and the range will support between 1,500 and 2,000 animals, provided the carrying capacity of the reservation is not exceeded by the combined stocking with domestic animals and wildlife. When that population of antelope is reached, it will be possible to have a limited annual harvest. Several small bands of antelope occur on the Standing Rock and Fort Berthold Reservations in North Dakota, but they are unprotected at the present time.

Black bear occur in fair numbers on most of the reservations in the Lake States and the present population is estimated at 800. Since most Indians do not utilize bear to any great

extent, there appears to be little need of giving them much additional protection.

Eighty elk have been estimated for the Dakota reservations but most of these are under fence. Future management of this species on Indian reservations does not hold much promise, because of the comparative scarcity of suitable environment, and the likelihood of interference with farming.

An estimated moose population of 80 animals occurs on the Grand Portage, Nett Lake, and Red Lake Reservations in Minnesota although they are given practically no protection at the present time. There appears to be little chance of increasing this population and moose in similar areas in northern Minnesota which have been given complete protection have not shown an increase.

Fish.--By nature, Indians do very little sport fishing themselves, but they do derive

considerable income from the sale of special licenses and by serving as guides. On the Menominee Reservation in Wisconsin, where stream trout fishing is considered the finest in the state, a sizable income is derived from selling special licenses.

On a number of reservations in Minnesota and Wisconsin, which are located in the heart of the tourist country, Indians also receive considerable income from serving as guides during the summer months. Since many of them realize that this work is dependent on good fishing, the services of biologist of the Fish and Wildlife Service have been requested to advise them on their fishery problems. Biological surveys of the important waters in the Lac du Flambeau Reservation in Wisconsin are now underway. Fish parasite investigation on some of the Menominee Reservation lakes have also been started.

At the Red Lake Reservation in Minnesota, a large commercial fishery is operated and managed by Indians. Prior to the war they were removing approximately 650,000 pounds of game fish annually. This take was well below the limits of productivity of the lake, hence the annual catch was increased to one million pounds of games fish during the war. Whether the lake can continue to produce under this pressure remains to be seen but as yet no evidence of depletion has been noted. In addition to the game fish, approximately 250,000 pounds of rough fish have been removed annually. In harvesting the fish, restrictions are set upon as to size of mesh and footage of nets that can be used. At the present time the entire income on this reservation is derived from fishing, trapping, and timber. Within a few years the mature timber supply will be so depleted that the Indians will have to depend largely on wildlife and

subsistence farms for their support until a second timber crop is ready for harvesting. Some commercial fishing is also carried on by Indians living on reservations on the shores of Lake Superior. This fishing is done entirely under state regulations.

Small game.--Upland game birds, waterfowl, and small game mammals are hunted very little by Indians. Interest in hunting them is lacking because the amount of food received does not compensate them for the effort and expense involved. As a result of this lack of hunting pressure, small game is plentiful in many reservations in this region. This abundance has attracted non-Indian hunters and the increased hunting pressure brought on by them is forcing the Indians to realize that they must manage these species even though they do not utilize them themselves. Here again the Indians' concept

of wildlife as a utility and not as a source of recreation is clearly demonstrated.

Fur bearers.--The most successful approached for getting action programs started in wildlife conservation has been through the medium of the fur-bearing animals. Interest in them is paramount because the pelts produce an economic return and the carcasses of many can be utilized for food. All species of fur bearers are trapped, but from the standpoint of greatest monetary returns, the muskrat and beaver are the most important.

In general, Indians are poor trappers and are very careless with pelt preparation. This is contrary to the general impression that they are "naturals" in this field. Three facts have been responsible for this situation: a lack of suitable equipment for trapping and pelt preparation; an insufficient knowledge of trapping and pelt preparation

techniques; and a natural tendency to do things the easiest possible way.

The trapping seasons on many reservations starts in August and closes as late as June. The late season catches resulted in the taking of a high percentage of pregnant females and most of the early caught animals had unprime pelts of small size and of low quality.

Most animals were obtained by those methods requiring the least amount of effort. In some instances this meant they were taken either by spearing, shooting, or trapping. When traps were used, the common practice was to run long lines and to make infrequent visits to them. Oftentimes, dogs were used as aids in catching fur bearers, especially mink.

Before instructions were given, the care of the pelts was inferior to those prepared by non-Indians. Very little fleshing was done, and as a result much fat and flesh were left on the skins. Poorly-constructed

stretchers of varied sizes and shapes were also used and poorly-prepared pelts have been responsible for the low prices. This fact, coupled with the Indian's desire to get cash immediately for his pelts, has made him the victim of unscrupulous fur buyers.

Beaver. On the Cheyenne, Rosebud, and Pine Ridge Reservations in South Dakota, a system of regulating the beaver take has been in effect during the past 4 years. Under the permit systems adopted, the beavers have increased to the level where they can be harvested in comparatively large numbers on a sustained yield basis. The Cheyenne River method will be discussed here as it represents the best of the three systems followed.

The tribal council on the Cheyenne Reservation issued 49 paid permits during the 1940-41 trapping season and 137 beavers were harvested. The number allowed each permittee was unlimited. In the 1941-42 season 49

permits were issued and 128 animals were trapped although only 5 were allowed per person. Under the same regulations 117 were taken by 63 permit holders in the 1942-43 season. However, more drastic regulations were put into effect the following season, 53 permits were issued and 163 beavers were trapped. Under the same restrictions in the 1944-45 season 69 permits were issued and 193 beavers were taken. Accurate records of the annual beaver harvest for the past four seasons have been possible because all skins must have state metal tags affixed by Indian Service or tribal council officers before they can be legalized. When they are tagged an exact record of where they were trapped is obtained. These records have made it possible to mark the annual catches on a map and determine where the greatest beaver production is taking place. Areas that are not holding up can be detected and closed to trapping if

necessary. This regulated beaver cropping system is undoubtedly one of the best yet devised and has the following advantages: (1) reduces the sale of illegal furs to a minimum; (2) brings a better financial return to the Indians; and (3) provides an excellent system for recording the distribution of the catch.

Grand Portage in Minnesota has inaugurated a closed season on beavers for a 5-year period. Beavers have been restocked in the depleted parts of the reservation from outside sources or have been transplanted from areas of abundance within the reservation. Within a few years a managed beaver trapping program will become effective on this area.

Muskrat. On the Bad River Reservation in northern Wisconsin, a muskrat management project, known as the Bad River Muskrat Enterprise, has been in operation since the fall of 1942. This enterprise is patterned after the well-known projects near The Pas in

Manitoba, Canada. The entire 10,000-acre marshal of this project was closed to trapping in December 1942, when it had a population of approximately 5,000 animals and was opened to trapping for the first time in November 1944, with an estimated 20,000 population. Under a 50-50 share-cropping system only 1,500 muskrats were taken during the 1944-45 season because of the shortage of trappers caused by the war. Approximately 2,400 have been trapped to date during the present open season.

Under the plan of operation, the marsh is divided into areas and the trappers either choose an area or draw lots if others want the same place. Catch and grade records are also kept for each one of these units. Most of the traps used are of the "stop-loss" type which makes it possible to reduce losses by "wringing-off" to a minimum.

All of the trapped animals are brought to a centrally-located fur house where they are skinned, fleshed, and dried. This makes it possible to give close supervision to all of the operations performed and high quality pelts result. Excess fat and flesh are removed from the pelts by placing them on fleshing boards and scraping them with a dull knife. For shaping and drying, the pelts are placed on uniformly-shaped wire stretchers which are provided by the enterprise. A receipt is issued for the daily catch when the pelts are turned in for drying. They are then brought to the adjoining drying room and hung up on separate drying lines, the number of which corresponds with the trapping area. After the pelts have dried slowly for about one week, they are removed from the stretchers, perforated with a fur marker, and graded. The furs are graded weekly and the

trappers are then paid according to current market prices.

They are then baled and shipped to a fur auction company to be sold. Muskrat furs that are now reaching the market from this enterprise are considered to be among the finest in the country.

On the Turtle Mountain Reservation in North Dakota, the tribal council, through its sales association, has been buying fur from Indian trappers since the fall of 1944. The plan followed is to pay the local market price for furs and to sell them for more money in large lots through auction companies. All profits made are returned to the trapper on the basis of the number of pelts sold.

"Stop-loss" traps and wire stretchers are now being used by most of the muskrat trappers. Numerous demonstrations on proper trapping and pelt preparation have resulted in

good quality skins not coming from the Turtle Mountain area.

CONCLUSION

Substantial progress has been made in the management of the wildlife resources on 8 million acres of Indian lands in the Dakota and Lake States during the past 4 years, but much work still remains to be done. Due to the Indians' concept of wildlife as utility rather than as a source of recreation, the greatest interest has been shown in the management of their fur-bearing animals. Regulated seasons, fur enterprises, marketing cooperatives, and stocking programs are all examples of the advancements made in fur management on these lands. Conservation through visual education has been well received by both school children and adults. A sequence of this program should be adoption of a standardized course in conservation education for the children and an extension

program for the adults. Game regulations are now in effect on a number of reservations, but there are still many where no conservation practices are being followed.

81ST CONGRESS
1ST SESSION
(April 12, 1949)

PTA K

S. 1488

IN THE SENATE OF THE UNITED STATES

April 2 (legislative day, March 18), 1949

SEC. 2. A contract under this Act with respect to a tribe referred to in the first section shall--

(a) convey to the United States the title to all tribal, allotted, and inherited lands or interests therein belonging to the Indians of said tribe which are required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota, to be known as Oahe Dam, including such lands along the margin of said reservoir as may be required by the Chief of Engineers, United States Army, for the protection, development, and use of said reservoir;

(b) provide for the payment of--

(1) just compensation for lands and improvements and interests therein, including values above and below the surface, conveyed pursuant to subsection (a);

(2) costs of relocating and reestablishing the members of such tribe who reside upon such lands; and;

(3) costs of relocating and reestablishing Indian cemeteries, tribal monuments, and shrines located upon such lands;

(c) provide for reimbursement to the Bureau of Indian Affairs for reasonable costs actually incurred in relocating and reestablishing Government-owned buildings, facilities, roads, and bridges located upon such lands;

(d) provide adequate protection for the rights of individual members of such tribe who may refuse to join in the approval of the said contract;

(e) provide for the preservation of treaty rights of the tribe and the rights conferred by the Act of June 18, 1934 (48 Stat. 984), in regard to fishing, hunting, and trapping insofar as is practicable under the physical conditions existing when the Oahe project is completed;

and

(f) provide for nonexclusive access rights to the Oahe Reservoir and for reservation of the use of the land between the water line and the taking line to the said Indians so far as may be consistent with the operation and control of the Oahe project.

PTA O

81st Congress
1st Session
(July 13, 1949)

House of Representatives Report No. 1047

Page 3

	Cheyenne River	Standing Rock
	Acres	Acres
Trust allotments	24,868.87	46,116.73
Tribal lands	70,650.09	8,782.69
Non-Indian lands	18,191.30	12,347.04
	113,710.26	67,247.04

Page 4, ¶ 8

The Indians of both reservations will lose valuable wildlife resources and recreational areas. On the Cheyenne River Reservation, over 400 deer are estimated to live year long in the timbered area which will be inundated. In the bottoms area, pheasants, rabbits, and raccoons are numerous. Several hundred bank-denning beaver are annually taken

from the same area. Wildlife which provides important feed for over 100 families will be lost. On the Standing Rock Reservation it is estimated that approximately 600 white-tailed deer and 100 mule deer use the bottom land year long. Practically all pheasants, numbering thousands, which occupy a strip of land 10 miles wide out from the Missouri River, spend the winter months on the bottom-land area. The cottontail rabbit population of this area is also large. Thus on both reservations, valuable recreational areas used for trapping and hunting will be lost. Fishing is not important on either reservation at the present time.